U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 March 2009

CASE NO.: 2009 ERA 00001

In the Matter of:

THOMAS SAPORITO,
Complainant,

v.

FLORIDA POWER and LIGHT COMPANY,
Respondent.

Summary Decision Dismissing Complaint

This case involves a complaint filed on August 14, 2008, against Respondent Florida Power & Light (FPL) by *Pro Se* Complainant, Thomas Saporito. The complaint alleged that Complainant worked for Respondent from 1982 to 1988 when he was terminated in violation of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (ERA) for blowing the whistle to the Nuclear Regulatory Commission (NRC) about the allegedly unsafe way his employer was operating its Turkey Point nuclear power plant. Respondent, in turn, insisted that it terminated Complainant for repeated acts of insubordination and lying to management. After years of litigation and appeals, Complainant's original complaint challenging his 1988 termination was eventually dismissed; however, over the past two decades, Complainant has filed a number of whistleblower actions against Respondent and others which were dismissed; and this is the most recent variant of this on-going saga.

On August 14, 2008, the same day Complainant filed the instant complaint with OSHA, he participated in a telephone conference with NRC staff and an attorney representing Respondent regarding: "operations at FPL's nuclear power plants…." During the teleconference, Complainant repeated allegations regarding what he considered his wrongful termination two decades ago. In the complaint filed with OSHA, he alleged: "During the teleconference call FPL verbally disparaged the Complainant in a public forum before the NRC and requested that the NRC issue an ORDER prohibiting the complainant from any future participation in the NRC's public process under the NRC regulations at 10 C.F.R. 2.206 of the Code of Federal Regulations." (*See*, August 14, 2008, Complaint, ¶ 3.) Based upon the alleged disparagement, the complaint charged that: "FPL is retaliating against Complainant solely because of his recent and his past whistle-blowing conduct in raising safety concerns to the NRC about FPL's nuclear operations." (Id. at ¶ 4). On October 23, 2008, OSHA dismissed the

complaint on the ground that: "Complainant was unable to show any specific adverse action directed towards him by any employer as a result of remarks made by Respondent representatives at the hearing held on August 14, 2008."

On November 6, 2008, Complainant filed his objections to OSHA's findings and requested a hearing. Although he made no allegation of an adverse employment effect in his August 14, 2008 complaint to OSHA, Complainant alleged that he informed OSHA's investigator that: "he had made applications for employment with employers other than FPL and believed FPL's actions had blacklisted him." (*See*, Compl. Objections, at fn.1).

On December 8, 2008, Respondent FPL, citing the Summary Decision Rules at 29 C.F.R. §§ 18.40-1, filed a Motion to Dismiss the complaint. Thereafter, on December 29, 2008, Complainant filed an Amended Complaint which alleged that FPL's disparaging comments on the public record before the NRC: "resulted in Complainant's inability to obtain employment at other nuclear power plants and/or other employers and serves to dissuade [him] from engaging in ERA protected activity." (*See*, Amended Complaint at ¶¶ 3-4.). On January 2, 2009, Respondent filed a Motion to Strike the Amended Complaint. Complainant has responded to both motions.

The Amended Complaint

FPL objects to the Amended Complaint as an improper attempt to circumvent the rules which require that complaints of discrimination first be filed with OSHA. 29 C.F.R. §24.103(c). FPL notes further that it has filed responsive pleadings, and accordingly, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Complainant may not amend his complaint without its written consent or leave of the court. Since FPL has not consented, and leave of the court has not yet been obtained, FPL moves to strike Complainant's Amended Complaint.

The case law, the Act, and the ERA regulations make clear that a complainant has 180 days from the "date of the violation" to file his or her complaint. In this instance, it was the public availability of the NRC transcript containing allegedly disparaging remarks by Respondent's counsel during the August 14, 2008 NRC teleconference that the Amended Complaint alleges resulted in adverse employment action by other potential employers. This is an allegation of a new violation not contained in the original complaint; and like a termination or refusal to rehire, it may, if retaliatory, constitute a separate actionable "unlawful employment practice" against a former employee. *See, e.g.*, Morgan, 536 U.S. at 114; Conley v. Village of Bedford Park, 215 F.3d 703, 710 (7th Cir. 2000). As a result, a party must file a separate charge within the statutory period or lose the ability to recover for it. In this instance, Complainant had 180 days from the date the alleged adverse action occurred to file a claim. *Id*.

Thus, unlike the situation in Sasse v. U.S. Attorney, 1998 CAA 07 (ARB, January 30, 2004), in which a complaint was amended after the deadline for challenging a new violation had expired, the claim of discrimination based upon FPL's comments at the August 14, 2008 teleconference remain timely. Moreover, it does not appear that the amendment is sought in bad faith, for dilatory reasons, or to prejudice the Respondent. As such, an amendment to the complaint to permit a resolution of a claim in the nature of blacklisting, based upon the content of the teleconference communications which were the subject of the original complaint, will, in

the interest of justice, foster a more efficient, less costly, and timely resolution of the matter. Accordingly, leave to amend the complaint is hereby granted, and FPL's Motion to Strike the Amended Complaint will be denied.

Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See*, Gillilan v. Tennessee Valley Authority, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); Flor v. United States Dept. of Energy, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. Anderson, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Held v. Held, 137 F.3d 998, 999 (7th Cir. 1998). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, (1962); Rogers v. Peabody Coal Co., 342 F.2d 749 (6th Cir. 1965).

When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. Lujan v. Defenders of Wild-life, 504 U.S. 555, 112 Sup. Ct. 2130 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Evidence submitted by a party opposing summary decision must then be considered in light of its content or substance rather than the form of its submission. Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994).

Considering the foregoing principles, and for reasons set forth below, summary decision will be entered holding that Respondent's reply to the NRC was a permissible exercise of its right to petition the government for redress and was neither retaliatory nor discriminatory within the meaning of the ERA.

Proceedings before the NRC

The NRC meeting on August 14, 2008, was chaired by Mark Maxin, NRC's Acting Deputy Director of Policy and Rulemaking, and was convened pursuant to the NRC's petition process as set forth at 10 C.F.R. §2.206. In accordance with the NRC's rule, any person may request it to take an enforcement action against a licensee; and, in this particular instance, Thomas Saporito was the petitioner seeking an enforcement action against his former employer, FPL. As summarized by Chairman Maxin, Complainant sought a notice of violation and the imposition of a $100,000.00 penalty against FPL based upon a decision of the Secretary of Labor issued on June 3, 1994. The meeting was transcribed by the NRC, and a copy of the transcript (hereinafter, Tr.) is annexed as an attachment to Respondent's Motion to Dismiss.

The NRC meeting transcript shows that petitioner Saporito invoked the Section 2.206 petition process in an apparent effort to convince the NRC to revisit the decisions involving his original termination in 1988 which were rendered during the years of litigation before both the Department of Labor and the Eleventh Circuit Court of Appeals. (Tr. 14-35). Complainant then informed the teleconference participants of other alleged violations by FPL involving other employees, (Tr. 36-42), before returning again to the Secretary of Labor's June 3, 1994 decision, arguing that, after the Secretary remanded the case for further consideration in 1994, the judge who presided over the remand proceeding, and the subsequent appellate tribunal that reviewed the judge's decision on appeal, both erred in applying the law. (Tr. 43-48). The judge and the appellate tribunal both concluded that, although Complainant had engaged in protected activity, his termination was not the result of discriminatory retaliation attributable to his protected activity; and Complainant advised the NRC staff that he disagreed with those conclusions. (Tr. 47-8).

Ms. Marjan Mashhadi participated in the NRC teleconference call as FPL's attorney. (Tr. 8). She listened to the proceedings through 51 pages of transcript; and when Chairman Maxin advised that time constraints would necessitate an end to conference that day, she requested, and was granted, two minutes to speak. (Tr. 52). Her presentation is the subject matter of the complaint filed in this proceeding, and her comments are set forth in full below. Ms. Mashhadi stated:

> I understand that there are time constraints. But I would like to point out that Mr. Saporito has been attempting to litigate this exact issue for over 20 years.
>
> He has had no success. His appeals have been repeatedly rejected by the ALJ, by the ARB, as well as the Eleventh Circuit Court of Appeals. He has taken this all the way up to the Supreme Court and has lost at that level after two decades of virtually identical, fully litigated and meritless complaints.
>
> He is clearly abusing the whistleblower protection process. He is trying to harass FP&L. He is trying to perform an Enron(sic)[end run] around the numerous unfavorable rulings that he has received from both the Department of Labor and the courts and the NRC in order to harass FP&L.
>
> As a result, FP&L would like to ask that the NRC actually order the complainant to cease from filing 2.206 petitions with respect to the 1986(sic) [1988] discrimination allegations, which has already been fully litigated. We believe that this is a waste of time, this is a waste of resources, both of the Commission and of the Licensing Board and of the PRB as well as of FP&L.
>
> We recognize that this is an extraordinary measure, that this is, frankly, an extraordinary petitioner. And we would like to make

> that request in order to wrap up once and for all these meritless allegations. Tr. 52-53.

At the conclusion of Ms. Mashhadi's comments, Mr. Saporito "strenuously" objected and moved to strike her remarks "in their entirety." (Tr. 54). Chairman Maxin denied the motion to strike, advised the parties that a decision on Complainant's Section 2.206 petition would follow later, and closed the proceedings. (Tr. 55-6). Within hours of the teleconference, Complainant drafted the complaint alleging disparagement and discriminatory retaliation as a result of FPL's comments during the teleconference; and that complaint, as amended, is the subject of this proceeding.

On October 27, 2008, the NRC's staff issued its decision on the petition, a copy of which is annexed as an exhibit to Respondent's motion. The NRC denied Complainant's request for an enforcement action, ruling specifically that the Complainant had previously raised essentially the same issues and the NRC previously addressed them; and the latest petition had presented nothing new. As such, the NRC advised Mr. Saporito:

> As your request for enforcement actions was previously reviewed consistent with NRC policy, your submittal provides no significant new information, and your DOL case was subsequently dismissed, thus, the NRC staff continues to find no basis for further review of your request for enforcement action under the 10 CFR 2.206 petition process, <u>now or in the future</u>. (Emphasis added).

Whistleblower Protection

Pursuant to the Employee Protection Provision of Section 210 of the ERA:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 *et seq.*], if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or any proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 *et seq*.];

> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq.*].
> 42 U.S.C.A. § 5851(a)(1).

To sustain a discrimination claim under the ERA, a complainant must prove, by a preponderance of the evidence: (1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the discrimination arose because the employee engaged in protected activity. *See*, Deford v. Secretary of Labor, 700 F.2d 281, 286, (6th Cir. 1983). As amended in 1992, the Act requires a showing that the protected activity was: "a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C.A. § 5851(b)(3)(C). Relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of protected activity. 42 U.S.C.A. § 5851(b)(3)(D).

The Complaint filed in this matter on August 14, 2008, alleges that FPL disparaged Complainant during the August 14, 2008 teleconference while he was engaged in the protected activity of blowing the whistle to the NRC about FPL's operations at its Turkey Point nuclear power plant. The record shows, however, that, at the time the complaint was filed, Complainant was not an employee of FPL; and the Complaint alleges no tangible consequences affecting any aspect of Complainant's employment as a result of FPL's remarks during the NRC teleconference.

In the Amended Complaint, however, it is alleged that FPL took adverse employment action against Complainant as a former employee when it made disparaging comments about him on a public record and requested sanctions by the NRC against him which: "resulted in Complainant's inability to obtain employment at other nuclear power plants and/or other employers and serves to dissuade [h]im from engaging in ERA protected activity." (Amended Compl. at ¶¶ 3-4). Complainant further alleges in his "Opposition" to the Motion to Dismiss that he is covered by the Act as a former employee and as a recent job applicant for employment at FPL. (Opp. at 7). With respect to the latter assertion, it must be noted that Complainant may have recently filed a job application with FPL; however, FPL has made it clear over the years that Complainant was fired in 1988 for insubordination, and it does not rehire individuals who were

terminated for insubordination. In prior whistleblower litigation involving this Complainant, FPL has established that its refusal to rehire him is a non-discriminatory personnel policy decision applied to complainant and all former employees who were fired for insubordination. *See*, Saporito v. Florida Power & Light, 2008-ERA-00014 (ALJ, October 2, 2008). Since nothing has changed in respect to Complainant's disqualification as a job applicant with FPL, it will not further be considered here. His other allegations, however, warrant further review.

FPL's Comments to the NRC

The record shows that the teleconference was initiated as a consequence of Complainant's petition which essentially reiterated his objections to his 1988 termination and recounted the errors he perceived in the ultimate dismissal of his whistleblower complaint by the Department of Labor and the Eleventh Circuit Court of Appeals. Apparently, Complainant used the NRC's Section 2.206 petition process in 2008 basically to rehash the complaints he had previously filed with the NRC in past Section 2.206 petitions; and FPL's counsel so advised the NRC during the August 14, 2008 teleconference.

Considering Complainant's history of previous filings seeking review of matters long since resolved by administrative and judicial dispositions, counsel for FPL remarked to the NRC teleconference participants that Complainant was attempting to re-litigate his 1988 dismissal. As such, she characterized Complainant's petition as meritless harassment, an abuse of the whistleblower process, and a waste of time and resources. She, therefore, requested the NRC to order Complainant to cease from filing 2.206 petitions with respect to the 1988 discrimination allegations which were dismissed by the Department of Labor and the Court.

In light of Complainant's propensity to re-raise issues long since resolved against him, his insistence that the comments by FPL's counsel during the teleconference actionably "disparaged" him, constituted improper retaliation, and discrimination against him lacks merit. As the ARB stated over a decade ago, when Complainant lodged similar charges under similar circumstances:

> This complaint is frivolous. Saporito alleges two violations of the whistleblower protection provision of the ERA: 1) that Florida Power … retaliated against Saporito by making negative statements about Saporito in a filing with the NRC; and 2) that the law firm retaliated against Saporito …. Summary decision and/or dismissal is appropriate with regard to both issues. Saporito v. Florida Power and Light, 94-ERA-35 (ARB, July 19, 1996) (Emphasis added).

The record shows that Complainant invoked the NRC's 2.206 petition process to reargue the circumstances of his dismissal for cause in 1988, and FPL's counsel initially clarified the historical context of his allegations. I find nothing disparaging in those comments.

Counsel observed further that Complainant was abusing the whistleblower protection process. While this was a subjective assessment, it nevertheless represented counsel's fair

interpretation of the procedural background underlying the subject matter of Complainant's 2.206 petition; and it was uttered in defense against his petition.

Moreover, counsel's plea to the NRC for an order directing Complainant to cease filing 2.206 petitions with respect to the 1988 discrimination allegations was directly responsive to the circumstances which Complainant placed before the NRC. Indeed, Complainant moved to strike FPL's comments in their entirety; however, the Motion to Strike was not only denied by the meeting's chairman, but the NRC subsequently confirmed, in its denial of Complainant's petition, that both the NRC and the Department of Labor had previously addressed the subject matter of Complainant's most recent 2.206 petition.

Thus the NRC substantiated the accuracy of FPL's objection that Complainant was filing repetitious petitions. In its October 27, 2008 letter responding to Complainant's Section 2.206 petition, the NRC specifically referenced the repetitious nature of Complainant's filings and denied his petition on that ground, observing that:

> 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 resolution has been achieved, the issues have been resolved, and the resolution is applicable to the facility in question…. As your request for enforcement action was previously reviewed consistent with NRC policy, your submittal provides no significant new information, and your DOL case was subsequently dismissed, thus, the NRC staff continues to find no basis for further review of your request for enforcement action under the 10 CFR 2.206 petition process, now or in the future. (Emphasis added).

Consequently, while FPL was not granted the cease and desist order it requested, the NRC did seem to signal an intention not to entertain further 2.206 petitions involving Complainant's allegations of discrimination regarding his 1988 termination, "now or in the future."

Considered in context, the comments conveyed to the NRC staff on August 14, 2008, by FPL's counsel contained no "improper references" to Complainant's alleged "whistleblowing" filings. Indeed, a few months later, on October 2, 2008, the Department of Labor judge who presided over this Complainant's whistleblower complaint challenging FPL's refusal to rehire him, expressed concerns very similar to those expressed by FPL's counsel about Complainant's repetitious filings challenging, in one form or another, the 1988 termination and its consequences. The judge in that case stated:

> It would be unreasonable and impractical to allow an unlimited number of claims based on this set of facts, as proposed by the Complainant. The laws relating to Whistleblowers were not designed for that type of obvious and profound abuse. Theoretically, under Complainant's argument, a discharged

> employee could apply hourly (or more frequently, if desired) to his or her former employer by use of the online application process and "create" new adverse actions each time. This would result in a never-ending stream of meritless litigation that would effectively put the courts into overload.
>
> In deciding this issue, I have considered the Complainant's written brief and find it wanting. In his brief, Complainant argues that the exceptions of the "continuing violation doctrine" and "equitable tolling" doctrine apply to his case. This attempt to "bootstrap" these doctrines into the parameters of this case is not supported by any viable evidence but only selfserving conjecture and argument on the part of the Complainant, which I find meritless. Saporito, *supra*, 2008-ERA-00014.

Under these circumstances, clear and convincing evidence demonstrates that FPL was neither acting in retaliation nor acting with discriminatory animus when it requested the NRC to consider the repetitive nature of Complainant's petitions and grant it cease-and-desist relief based upon its characterization of Complainant's allegations as meritless harassment. Assuming the second, third, or fourth iteration of essentially the same 2.206 petition previously denied by the NRC constitutes protected activity each time it's re-filed, and that assumption seems rather dubious in light of the requirement that whistleblowers must have a reasonable basis for believing a violation has occurred,[1] I, nevertheless, find nothing discriminatory within the meaning of the ERA in the defense articulated by FPL's counsel or the relief that she sought on FPL's behalf.

FPL's First Amendment Right

A respondent, moreover, has a right to petition for relief appropriate to the circumstances in a proceeding before a federal agency. *See*, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, (1972); *See*, *e.g.*, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, (1961); United Mine Workers v. Pennington, 381 U.S. 657, (1965); Thermos Co. v. Igloo Products Corp., 1995 WL 745832, 6 (N.D.Ill.1995) (holding that "attempts to protect a valid and incontestable trademark" are privileged under the Noerr-Pennington doctrine); Virtual Works, Inc. v. Network Solutions, Inc., 1999 WL 1074122 (E.D.Va.1999) (applying the Noerr-Pennington doctrine to tortious interference claims); Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159-60 (3d Cir.1988) (recognizing applicability of the doctrine to abuse of process and other claims); Baltimore Scrap Corp. v. David J. Joseph Co., 81 F.Supp.2d 602, 620 (D.Md. 2000), aff'd, 237 F.3d 394 (4th Cir. 2001) (holding that Noerr-Pennington immunity applies to common law claims); and Sosa v. Direct TV, Inc., 437 F.3d 923, 935 (9th Cir. 2006). In California Motor Transport, the Court added that "the right to petition extends to all departments of the Government [and] [t]he right of

[1] While Complainant may have a right to file repetitive petitions, they may not, having previously been denied on the merits, constitute protected activity; s*ee*, Passaic Valley Sewerage Commissioners v. Dept. of Labor, 992 F.2d 474 (3rd Cir. 1993); and the NRC, it would seem, may, in its discretion, decline to continue to entertain them.

access to the courts is indeed but one aspect of the right of petition." In this instance, the NRC's teleconference was the appropriate time and the appropriate forum for FPL to seek the relief it requested, and FPL's counsel did so with ample justification in a succinct and measured way.

As stated by the Court in HAVOCO of America v. Holloway:

> The First Amendment guarantees defendant's right to attempt to enlist the government on their side of the dispute. That this petitioning activity may have had incidentally an adverse effect on plaintiff's business, even [though] dependents knew this and intended such a result, has no effect on the First Amendment's protection as long as the activity represents a genuine attempt to influence governmental action. 402 F.2d at 650.

I find that Ms. Mashhadi's remarks constituted a genuine attempt to influence the NRC's consideration of Complainant's petition seeking an enforcement action against FPL, and, as such, her comments on FPL's behalf constituted a proper exercise of FPL's First Amendment rights.

Publication of the Teleconference Transcript

Complainant next represents, however, that he was injured by FPL's adverse comments, because the NRC makes public the transcripts produced during teleconferences convened pursuant to the 2.206 petition process, and potential employers could, therefore, gain access to FPL's remarks, resulting in his inability to obtain employment with other employers.[2] Although Complainant does not specifically allege in his Amended Complaint that FPL blacklisted him, his pleading suggest that the publication of a transcript in which FPL criticizes him will, or has, in effect blacklisted him.[3] Yet, neither the Complaint nor the Amended Complaint identifies the alleged employers that declined to hire Complainant or the specific opportunities he allegedly lost as a result of the remarks contained in the NRC transcript. Moreover, Complainant invoked the NRC process to pursue an enforcement action against FPL; and it is the NRC, not FPL, that

[2] An FPL paralegal noted that she was unable to obtain a copy of the transcript on the NRC website; however, Complainant was able to obtain it from the NRC's Agencywide Document Access and Management System website. It thus appears, as Complainant insists, that the transcript is a publicly available document accessible on the NRC website.

[3] A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. Leveille v. New York Air National Guard, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); *see Black's Law Dictionary* 154 (5th ed. 1979). As the ARB observed in Pickett v. Tennessee Valley Authority, 2001-CAA-18 (ARB Nov. 28, 2003), blacklisting may arise: "'out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment.' 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. Barlow v. U.S., 51 Fed.Cl. 380, 395 (2002) (citation omitted). Blacklisting assumes that an employer covertly follows a practice of discrimination. *Black's Law Dictionary* 163 (7th ed. 1999) ("to put the name of (a person) on a list of those who are to be boycotted or punished"). *Cf.* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975) ("[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against"). The Secretary stated in Earwood v. Dart Container Corp., Case No. 93-STA-16, slip op. at 5 (Sec'y Dec. 7, 1994) that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result." In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. *See*, Howard v. Tennessee Valley Authority, Case No. 90-ERA-24 (Sec'y July 3, 1991), *aff'd sub nom.*, Howard v. U.S. Dept. of Labor, 959 F.2d 234 (6th Cir. 1992) (table) (the existence of a memorandum and status report on whistleblower complaints was insufficient to establish blacklisting without further indications of specific adverse action).

controls the public availability of Section 2.206 petition proceedings transcripts. FPL is neither responsible for the public availability of the transcript nor who gains access to it.

Now I am not suggesting that an agency transcript containing a respondent's comments could never be used improperly to convey adverse information to a potential employer. Complainant does not, however, allege, and the record does not contain, any indication that FPL made any effort to provide copies of the transcript or communicate its counsel's remarks to potential employers or anyone other than the NRC panel which convened to hear Complainant's petition against FPL and to this forum in support of its defense against the complaint filed in this proceeding. Other than defend itself before the NRC, as was its right, there is no allegation or indication that FPL took any action to impair Complainant's employment or business opportunities with any other potential employer. Consequently, no discriminatory treatment of Complainant is attributable to FPL as a result of the transcript's publication. *See*, Howard, *supra*.

Chilling Effect of FPL's Request for Sanctions

Finally, Complainant contends that FPL's request that the NRC sanction him for repetitious filings of Section 2.206 petitions constitutes the type of retaliation that would dissuade a reasonable employee from blowing the whistle. Considering the circumstances in which FPL requested the sanction in this particular instance, I find Complainant's argument singularly lacking in merit.

FPL specifically acknowledged during the NRC teleconference that the relief it was requesting was an "extraordinary measure" designed to address extraordinary circumstances. The relief was not granted in the form FPL requested, but neither was it sought against "a reasonable employee." FPL tailored its request to address a former employee who was terminated for insubordination over two decades ago, but who continues to file repetitious petitions with the NRC involving a matter resolved years ago. FPL's comments were, thus, narrowly targeted in an effort to deter a specific former employee from abusing the NRC's Section 2.206 petition process, not to deter a reasonable employee from engaging in protected activity.

Indeed, Respondent recently asked for similar relief against Mr. Saporito in a Department of Labor whistleblower proceeding. *See*, Saporito v. Florida Power & Light, 2008-ERA-00014 (ALJ, October 2, 2008.). As the judge who presided over that proceeding explained, he denied FPL's request for want of jurisdiction, not because the request lacked merit. "Unfortunately," the judge stated, "this Court is not empowered to issue sanctions as requested by the Respondent." The record shows that Respondent asked the NRC for similar relief, and, under the specific circumstances of this complaint involving this Complainant, I find the evidence abundantly clear and amply convincing that its request for NRC sanctions was not a discriminatory attempt to dissuade a reasonable employee from engaging in protected activity. To the contrary, it would, by now, seem highly doubtful that a reasonable employee would retain the belief that FPL violated the ERA when it sought relief from multiple repetitive petitions raising issues the NRC had previously addressed and denied.

In summary, I find and conclude that FPL's comments to the NRC were consistent with its right to petition the NRC for relief under Noerr, Pennington, and California Motor Transport;

that FPL's comments were neither retaliatory nor discriminatory within the meaning of the ERA, but were appropriate under the circumstances; that the NRC made the transcript of its teleconference available to the public, not FPL, and neither the Complaint nor the Amended Complaint allege that FPL took any action to communicate the contents of the transcript to any potential employer. For all of the foregoing reasons, I find the evidence clear and convincing that FPL did not improperly discriminate against Complainant as a consequence of its response to Complainant's petition to the NRC, and Complainant has presented no genuine issue of material fact to the contrary. Therefore;

ORDER

IT IS ORDERED that the Respondent's Motion to Strike the Amended Complaint, be, and it hereby is, denied, and;

IT IS FURTHER ORDERED that the Respondent's Motion for Summary Decision Dismissing the Complaint be, and it hereby is, granted, and, accordingly;

IT IS FURTHER ORDERED that the Complaint, as amended, be, and it hereby is, dismissed.

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Stuart A. Levin
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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, DC 20210.

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, 800 K Street, N.W., Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant

Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order. If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).