



Issue Date: 15 December 2008

Case No.: **2008-ERA-00013**

In the Matter of

GARY PHIPPS,

Complainant,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

**ORDER RECOMMENDING APPROVAL OF
VOLUNTARY DISMISSAL**

This proceeding arises under the provisions of the Energy Reorganization Act of 1974 (ERA), as amended by 42 U.S.C. § 5851. The rules set forth in 29 C.F.R. Part 18 apply to this proceeding except as modified by 29 C.F.R. Part 24.

The Complainant filed a discrimination complaint on January 17, 2008. He alleged that he had been discharged in retaliation for voicing concerns related to potential nuclear safety violations by the Respondent. In a May 14, 2008 letter, the Regional Administrator of OSHA informed the parties that after investigation, OSHA determined that there was no reasonable cause to believe that Respondent had violated any statute covered by ERA and the case would be dismissed unless appealed. The Complainant filed an appeal with the Office of Administrative Law Judges on June 13, 2008, and the case was assigned to the undersigned Administrative Law Judge.

On December 1, 2008, the Complainant filed a motion to dismiss that stated:

I would like to notify the court that the Respondent has put me back to work at the Martin power plant 35 miles away as of 11/20/2008 and I would like the case to be dismissed without prejudice.

You requested to know any issues left open and below is the main issue but I will let my lawyer handle the state case.

1. Being made whole is having my nuclear access returned to me and going back to work in my former location in the simulator at the St. Lucie Nuclear Power Plant. That position is still open.

Subsequently, the Respondent's counsel informed this office that the client agreed with a dismissal and would accept a dismissal without prejudice. Accordingly, it is clear that the

Complainant no longer wishes to proceed in this matter before the Office of Administrative Law Judges and the case should be dismissed.

Voluntary dismissal of ERA whistleblower complaints are covered by Rule 41 of the Federal Rules of Civil Procedure. Rainey v. Wayne State University, 90 ERA-40 (Sec’y Jan 7, 1991) (order to show cause) Sup op. at 3, dismissed, (Sec’y Feb 27, 1991). Rule 41 applies because there are no procedures for voluntary dismissals contained in either the ERA, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 C.F.R. Part 18. Pursuant to 29 C.F.R. § 24.6, the disposition of complaints, including Rule 41(a)(1)(i) dismissals can be effected only by final order of the Secretary. Haymes v. D.P. Associates, Inc., 94-SDW-1 (Sec’y Aug. 16, 1994).

It is Recommended, that the Complainant’s request for voluntary dismissal be granted and this case be **DISMISSED**, without prejudice.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s Recommended Decision and Order. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).