



In the Matter of:

DONALD DUPREY,

ARB CASE NO. 00-070

COMPLAINANT,

ALJ CASE NO. 2000-ERA-5

v.

DATE: February 27, 2003

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerome A. Pivnik, Esq., Caroline M. Nitsche, Esq., Pivnik & Nitsche, P.A., Miami, Florida

For the Respondent:

James S. Bramnick, Esq., Melissa B. Medrano, Esq., Muller, Mintz, Kornreich, Caldwell, Casey, Crossland & Bramnick, P.A., Miami, Florida

FINAL DECISION AND ORDER

Donald Duprey filed a discrimination complaint with the United States Department of Labor after his employer, Florida Power and Light Co., demoted him. He alleges that FPL's action violated the whistleblower protection provisions of the Energy Reorganization Act of 1974, as amended (the "Act" or "ERA").¹ An Administrative Law Judge ("ALJ") heard the case and recommended that Duprey's complaint be dismissed. Duprey appeals and asks this Board to reverse the ALJ's recommendation. Duprey requests that we order reinstatement, back pay, benefits, compensatory damages, attorney's fees, and costs.

For the reasons discussed below, we affirm the ALJ's decision denying Duprey the relief he seeks. We also note and discuss an exception we have with the ALJ's decision, one of FPL's arguments, and Duprey's reasons why the ALJ erred.

¹ 42 U.S.C. § 5851 (1994).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's recommended decision pursuant 29 C.F.R. § 24.8 (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under, *inter alia*, the statutes listed in 29 C.F.R. § 24.1(a)). The Board is not bound by either the ALJ's findings of fact or conclusions of law but reviews both *de novo*. See 5 U.S.C. § 557(b) (2000); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000) and authorities there cited.

BACKGROUND

Duprey was hired as an Associate Nuclear Plant Operator at FPL's Turkey Point Nuclear Power Plant on February 8, 1993. FPL is a utility company that provides electrical services throughout Florida. Turkey Point, in Miami-Dade County, is one of two nuclear plants FPL owns and operates. Seven hundred persons work at Turkey Point, two hundred of which are in the Operations Department.

By 1994, Duprey had been promoted to Senior Nuclear Plant Operator. Other than directly manipulating the controls of the nuclear reactor, his job was to perform any operations duty or function. Senior Nuclear Plant Operators monitor and troubleshoot any problems with pumps, water treatment, straining systems, reactor cooling, and reactor functions.

At all times, Duprey was a bargaining unit employee subject to a collective bargaining agreement between FPL and the International Brotherhood of Electrical Workers ("IBEW" or "Union"). Employee grievances alleging violations of the agreement are settled according to a three-step procedure or are ultimately decided by binding arbitration. A Union representative, a company representative, and a neutral arbitrator comprise the arbitration panel.

From the beginning of his employment with FPL, Duprey spoke out about plant safety. Later, he specifically complained to management twice about supervisors ignoring nuclear safety procedures. He also reported his concern that FPL's enforcement of its sick leave policy created a safety hazard. Meanwhile, throughout his tenure with the company, FPL progressively disciplined Duprey for violating its excessive absenteeism policy. FPL demoted Duprey to Utility Worker I on January 28, 1999.

DISCUSSION

I. The ALJ's Decision

The ALJ found that FPL demoted Duprey because of protected activity and therefore concluded it violated the Act.² However, he also found that FPL clearly and convincingly demonstrated that it would have demoted Duprey even in the absence of his protected acts. Thus, he did not order relief.³ As we discuss below, we affirm these conclusions that the record fully supports.

A. FPL Violated the Act.

Duprey may establish that FPL violated the Act by initially showing that he engaged in protected conduct, that FPL was aware of that conduct, and that it took adverse action against him. He must also present sufficient evidence to raise an inference that the protected activity was the likely reason for the adverse action.⁴ Ultimately, Duprey must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in the decision to demote him.⁵

The ALJ found that on two occasions Duprey told supervisors that nuclear safety procedures were being ignored.⁶ He also found that FPL management was aware that Duprey

² Recommended Decision and Order (“R. D. & O.”) at 4. Section 5851 (b)(3)(C) of the Act reads in pertinent part: “The Secretary may determine that a violation . . . has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) [enumerating protected acts] . . . was a contributing factor in the unfavorable personnel action alleged in the complaint.”

³ R. D. & O. at 6. Section 5851 (b)(3)(D) of the Act states in part: “Relief may not be ordered . . . if the employer demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.”

⁴ *Dean Darty v. Zack Co. of Chicago*, 82-ERA-2, slip op. at 7-8 (Sec’y April 25, 1983).

⁵ 42 U.S.C. § 5851 (b)(3)(C). *Accord Dysert v. United States Secretary of Labor*, 105 F.3d 607, 609 (11th Cir. 1997).

⁶ R. D. & O. at 2. In 1995 or 1996, Duprey informed supervisors that another one of his supervisors had ignored an operations procedure which mandated that a nuclear plant operator, not a utility worker, would be responsible for a temporary lube oil skid. Hearing Transcript (TR) 32-36. In November, 1998, Duprey told a supervisor that because of a broken valve, a volume control tank purge procedure could not be done safely. The supervisor instructed Duprey to

raised safety issues.⁷ And because Duprey was demoted on January 28, 1999, only shortly after raising the volume control tank concern, the ALJ inferred a retaliatory motive.⁸

In addition, the ALJ drew an even “more powerful inference of retaliation” from the testimony of Scott Meier, a senior nuclear plant operator like Duprey. Meier testified that Brian Stamp, a supervisor, told him what Don Jernigan, the plant manager, had said. Jernigan, according to Stamp, said that he “had it out for [Duprey], he [Duprey] was a thorn in [Jernigan’s] side and wanted [Duprey] out of the company. And the only way they could go about that was attendance.”⁹

According to the ALJ, FPL produced a legitimate reason for demoting Duprey—repeated violations of its sick leave policy.¹⁰ However he determined that the inferences he drew from Duprey’s evidence outweighed FPL’s rebuttal. He therefore concluded that FPL violated the Act.¹¹ We concur that the record supports this conclusion though we are skeptical of the reliability of Meier’s hearsay testimony, discussed below.

B. FPL Met the “Clear and Convincing” Test.

Duprey will not be entitled to relief for the ERA violation if FPL “demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of ” Duprey’s protected acts.¹² As indicated, the ALJ concluded that FPL met this burden.¹³

perform the procedure anyway. TR 67-77. Notifying supervisors about violations of nuclear plant safety procedures is protected activity. *See* 42 U.S.C. § 5851 (a)(1)(A).

⁷ R. D. & O. at 2.

⁸ *Id.*

⁹ TR 345-46.

¹⁰ R. D. & O. at 3. An ERA respondent need only produce, not prove, a legitimate, non-discriminatory reason in order to rebut the complainant’s initial showing of discrimination. *Dean Darty*, slip op. at 8.

¹¹ R. D. & O. at 4.

¹² 42 U.S.C. § 5851 (b)(3)(D). If the respondent does not make the requisite demonstration by clear and convincing evidence, the Secretary must order the respondent to take affirmative action to abate the violation. The complainant is also entitled to reinstatement, back pay, other privileges of employment, compensatory damages, and all reasonable costs and expenses. *See* 42 U.S.C. § 5851(b)(2)(B).

¹³ R. D. & O. at 6.

FPL demonstrated that managing absenteeism was a “very important,” “critical” issue at the Turkey Point plant. Federal regulations mandate that a minimum number of plant operators like Duprey have to be at work during each shift.¹⁴ Nuclear reactors cannot be operated without the minimum complement of operators. Thus, when an operator is sick and does not come to work, other operators have to fill in. They are called at home or held over from their just completed shifts to assure that the minimum-staffing requirement is met. The disruption of work schedules and the consequent strain on families has the potential for adversely affecting operator morale. Therefore, operator attendance is a “big deal.” Management made Duprey aware of that fact very soon after he joined FPL and often thereafter.¹⁵

Thus convinced that controlling absenteeism was essential for operating the Turkey Point nuclear facility, the ALJ found that FPL had “valid business/personnel reasons to seriously maintain, implement and enforce its sick leave policy.”¹⁶

This policy, set out in the so-called “3-5-7” guidelines,¹⁷ utilizes progressive discipline. Supervisors are advised to be aware of the health of their employees and to help them avoid excessive absences. Sick leave at FPL is “excessive” when it is consistently and significantly higher than the average absenteeism of the employee’s co-workers.¹⁸ Strangely, the “3-5-7” guidelines do not address the consequences for accumulating three sick days in a twelve-month period. But in the event of five sick days, the guidelines urge supervisors to issue a verbal warning. A written warning is suggested when an employee accumulates seven days of sick leave. If absenteeism “continued to be problematic,” the guidelines permit stronger discipline. However, the guidelines are flexible, and supervisors were expected to treat absenteeism on a case-by-case basis. Duprey and other operators were aware of the guidelines.¹⁹

The ALJ also determined that during the 4-5 year period before the demotion, Duprey exhibited regular and continual excessive absenteeism despite counseling, warnings and reprimands.²⁰ Furthermore, FPL convinced the ALJ that it had not selectively applied its sick leave

¹⁴ TR 629, 748-49.

¹⁵ *Id.* at 4; TR 577-79, 609-10, 491-93, 170-74.

¹⁶ R. D. & O. at 4.

¹⁷ Complainant’s Exhibit (CX) 8.

¹⁸ TR 481, 666, 687; Respondent’s Exhibit (RX) 40.

¹⁹ RX2, RX4, RX5, RX8, RX10; TR 170-74. The record is not clear when the guidelines were written and whether they were distributed to the operators.

²⁰ R. D. & O. at 4. The record supports this finding. Duprey received a verbal warning about his absences in January 1995, a written warning about them in November 1995, and

policy to Duprey and had not treated other absenteeism offenders less harshly. As a result, the ALJ found the evidence clearly and convincingly established that FPL would have demoted Duprey even in the absence of the protected activity.²¹

FPL's contention that it would have demoted Duprey even if he had not engaged in protected activity is "highly probable." Therefore, we concur that FPL presented clear and convincing evidence, and the relief Duprey seeks must be denied.²²

II. Three Remaining Issues

A. The "Non-Issue"

Duprey was concerned that FPL's excessive absenteeism policy intimidated employees into coming to work when sick, thus rendering the nuclear workplace unsafe.²³ He alleges that in late December 1997 he reported this concern to Nuclear Safety SPEAKOUT, FPL's internal administrative body that investigates safety complaints.²⁴ Likewise, on February 27, 1998, Duprey voiced the same concern to the Nuclear Regulatory Agency (NRC).²⁵ He alleges that the ERA protects these activities.

Whether Duprey's reports to SPEAKOUT and the NRC were protected was, in the ALJ's "view," a "non-issue." He interpreted Duprey's testimony as indicating that Duprey did not consider the reports to have played a role in the demotion.²⁶

written reprimands about absenteeism in June 1996 and December 1997. RX2, RX3, RX5, RX10. Nevertheless, for the years 1995-98, Duprey averaged 4.6 more days absent per year than the other Turkey Point Senior Nuclear Plant Operators. RX40.

²¹ R. D. & O. at 4-6.

²² *See Colorado v. New Mexico*, 467 U.S. 310, 315-317 (1984) (Clear and convincing evidence is that which is "highly probable" because it would "instantly tilt [] the evidentiary scales in the affirmative when weighed against [the opposing evidence].")

²³ ALJ Exhibit 1 which is Duprey's Complaint.

²⁴ TR 51, CX17.

²⁵ Individuals are authorized to notify the NRC about a nuclear facility's failure to comply with "the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards." *See* 10 C.F.R. §§ 21.1, 21.2(d) (2002).

²⁶ R. D. & O. at 3.

We disagree that Duprey's reports to SPEAKOUT and the NRC are a "non-issue." They are protected acts.²⁷ The ALJ's "view" is curious in that, as mentioned above, Duprey contends in his Complaint that these two activities, among others, were reasons FPL demoted him.²⁸ Curious, too, because FPL concedes that these two reports constitute protected acts.²⁹

Nevertheless, we do not assign error here. The ALJ had already found that Duprey's two internal complaints about the safety procedures were protected and that FPL retaliated because of them. Therefore, his mistaken "view" about the SPEAKOUT and NRC reports did not affect his ultimate and proper conclusion that FPL violated the Act.

B. The Meier Hearsay

Meier testified that Stamp told him that Jernigan said Duprey was a "thorn in his side" and that the only way management could be rid of Duprey was by "attendance."³⁰ Meier's testimony about what Stamp told him is hearsay. Jernigan's alleged comment to Stamp is an admission by a party opponent and therefore not hearsay.³¹

Though FPL did not object when Meier presented this testimony,³² it now "strongly objects" to the ALJ's determination that Jernigan made the statement and his finding that it is evidence of animus toward Duprey. It argues that the ALJ unjustifiably assumed that Meier had less reason to lie than Stamp and Jernigan even though Stamp and Jernigan, under oath, denied making the

²⁷ See *Sellers v. Tennessee Valley Authority*, 90-ERA-14, slip op. at 4 (Sec'y April 18, 1991) (complaint to NRC is protected); *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 932-33 (11th Cir. 1995) (internal safety complaints are protected). Both cases are cited in Respondent's Proposed Recommended Decision and Order on Appeal, ¶ 314.

²⁸ ALJ Exhibit 1.

²⁹ See Respondent's Proposed Recommended Decision and Order On Appeal, ¶ 314. FPL also concedes that it had knowledge of both protected acts though it asserts that Brian Stamp, the only supervisor who knew about the NRC complaint, was not a decision-maker in the demotion. Therefore, his knowledge was insufficient as a necessary element of a prima facie case concerning Duprey's NRC report. *Id.* at ¶¶ 321-325.

³⁰ TR 345-46.

³¹ See 29 C.F.R. § 18.801(c) ("Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted."); 29 C.F.R. § 18.801 (d)(2)(i) (A statement is not hearsay if offered against a party and is that party's own statement in either an individual or representative capacity.).

³² TR 345-348.

comment. FPL also points to evidence that Meier may have been hostile toward FPL, Stamp, and Jernigan. Therefore, it asks that we “reverse” that finding.³³

Although though Meier’s testimony is unreliable hearsay, nevertheless, we do not assign error to its admission or to the ALJ’s finding that it evinces discrimination. Again, FPL did not object to its admission. Also, formal rules of evidence do not apply in hearings involving ERA complaints.³⁴ As a result, we do not conclude that the hearsay rule precludes the admission of Meier’s testimony.³⁵

C. The Memorandum of Agreement and the Arbitration Decisions

Duprey was one of approximately 4000 bargaining unit employees at FPL and, as mentioned, was covered by the collective bargaining agreement. This agreement is entitled Memorandum of Agreement (“MOA”).³⁶ Paragraph 6(a) of the MOA prescribes the number of paid sick leave days available to bargaining unit employees.³⁷ Paragraph 6(c) speaks to consequences in the event of “specific abuse” of sick leave.³⁸

³³ Respondent’s Brief at 5.

³⁴ 29 C.F.R. § 24.6(e).

³⁵ “Hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.” 29 C.F.R. § 18.802.

³⁶ TR 669, RX 41.

³⁷ (a) An employee who is absent due to a bona fide illness will be paid in any given year, dating from anniversary date of employment to the extent required by the employee’s illness, except illness due to employee’s use of alcohol, as follows: (1) One (1) week after six (6) months’ continuous service, (2) Two (2) weeks after one (1) years’ continuous service, (3) Three (3) weeks after three (3) years’ continuous service, (4) Four (4) weeks after four (4) years’ continuous service, (5) Six (6) weeks after five (5) years’ continuous service, (6) Eight (8) weeks after ten (10) years’ continuous service. Full or partial payment of wages covering absences outside the above limits may be granted in deserving cases upon the recommendation of the Department Head and the approval of a Vice President of the Company.

³⁸ (c) It shall be the mutual obligation of the Supervisors and Union Job Stewards to cooperate with each other in order to prevent abuse of sick leave. Upon specific abuse the company may require the employee to furnish to the Company a certificate from a competent physician before payment will be made for such illness. If the employee claims pay for illness without just cause, or accepts employment elsewhere during such illness, the employee shall be subject to disciplinary action.

The MOA does not contain a specific provision permitting FPL to discipline for excessive absenteeism. Therefore, according to Duprey, as a “matter of law” FPL is precluded from asserting excessive absenteeism as a basis for discipline. It may only discipline for “specific abuse” which means, essentially, falsely claiming to be sick.³⁹ But, says Duprey, his sick leave was legitimate and he did not exceed thirty absences. Therefore, he was not guilty of specific abuse and FPL cannot discipline him. Accordingly, argues Duprey, the ALJ erred in concluding that FPL would have demoted him for absenteeism even if he had not engaged in protected activity because, as a “matter of law,” FPL was precluded from doing so.⁴⁰

However, the ALJ found that “the legal disagreement between Complainant’s union and Respondent whether Respondent’s sick leave policy violates the Union contract was put to rest by arbitration in Respondent’s favor.”⁴¹ He based this finding on two arbitration decisions introduced into evidence by FPL.⁴² The first decision sustained FPL’s right to require an employee to produce medical certification of illness. Upon an employee’s refusal to honor requests for such certification, FPL could impose discipline.⁴³

The 1991 arbitration decision is even more pertinent to the facts here. The issue was whether FPL violates paragraph 6 of the MOA when it requires medical certification or disciplines an employee for excessive use of sick leave.⁴⁴ Four hundred twenty-one excessive absenteeism grievances had been filed prior to the decision. Arbitrator Marcus examined the longstanding positions of the Union and FPL, traced the collective bargaining history of paragraph 6(c), and discussed the earlier decision. He held that FPL “retains the right to discipline for excessive absenteeism.”⁴⁵

FPL wanted the arbitration decisions admitted to rebut Duprey’s contention that his absenteeism was a “smoke screen,” and that the real reason for the demotion was his protected activity. At the hearing FPL argued that the arbitration decisions would counter Duprey’s assertion that he was unaware of the many instances that fellow employees had grieved discipline for excessive absences. They would tend to negate his testimony that he was unaware that FPL’s right

³⁹ Complainant’s Brief at 20-22; TR 679-80, 796-97, 894-95.

⁴⁰ Complainant’s Brief at 20-22.

⁴¹ R. D. & O. at 3.

⁴² RX 29 dated January 15, 1985, and RX 30 dated December 20, 1991.

⁴³ RX 29 at 9, 12, 14.

⁴⁴ RX 30 at 3.

⁴⁵ *Id.* at 19.

to discipline for absenteeism had been arbitrated and decided. They could rebut his claim of surprise that FPL had employed progressive disciplinary measures in situations similar to his.⁴⁶

Duprey asserts that the ALJ erred in admitting RX 29 and RX 30. He argues they were inadmissible because Duprey was not a party to the decisions, they are irrelevant and hearsay, and they were admitted without proper foundation as to their authenticity.⁴⁷ At the hearing, however, Duprey objected only on foundation and relevancy grounds.⁴⁸

The ALJ denied Duprey's foundation objection. He properly ruled that since Michael Bryce, the witness who identified and described the arbitration decisions, was FPL's manager of labor relations, he was qualified to establish the foundation for their admission.⁴⁹

The judge also overruled Duprey's relevancy objection. He reasoned that the decisions "go to the motive or circumstantial evidence of the motives" of FPL.⁵⁰

We find this evidentiary ruling also was correct.⁵¹ The arbitration decisions certainly were relevant to show that paragraph 6 of the MOA did not preclude discipline for absenteeism. Therefore, FPL had the authority to demote for excessive absenteeism, the essence of its affirmative defense that relief should not be granted.⁵² Consequently, we reject Duprey's argument that as a matter of law the MOA precludes FPL from asserting its excessive absenteeism policy as a basis for the demotion. Furthermore, RX 30, the Marcus decision, describes the long history of grievances concerning excessive sick leave.⁵³ It serves as additional evidence that FPL frequently invoked the absentee policy as a basis for imposing discipline. Thus, it rebuts Duprey's testimony that FPL was using the policy as a "smoke screen" for a discriminatory motive.⁵⁴

⁴⁶ TR 102-05, 129-30, 206-13, 672-73.

⁴⁷ Complainant's Brief at 24.

⁴⁸ TR 672, 676.

⁴⁹ TR 664, 676.

⁵⁰ TR 676-77.

⁵¹ "*Relevant evidence* means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401.

⁵² 42 U.S.C. § 5851(b)(3)(D). *See supra text* accompanying note 2.

⁵³ RX 30 at 4-9.

⁵⁴ Duprey also argues that the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (2000), like the MOA, trumps FPL's absenteeism policy. He asserts that he was qualified to take

CONCLUSION AND ORDER

The record supports the ALJ's conclusion that FPL violated the whistleblower protection provisions of the Act when it demoted Duprey for engaging in protected activity. Therefore, we affirm that conclusion. Likewise, the record supports a finding that FPL would have demoted Duprey even in the absence of protected activity. Therefore, we deny the relief Duprey seeks.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

FMLA leave because of a serious medical condition, that he notified a supervisor of his need for leave, and that he took FMLA leave. According to Duprey, demoting him for absence taken while on FMLA leave constitutes unlawful retaliation and thereby violates FMLA. Therefore, he claims, FPL cannot assert its absenteeism policy as a basis for demotion because to do so conflicts with his FMLA rights. Complainant's Brief at 22-23. Except for a passing reference to FMLA in his Complaint, Duprey raises this argument for the first time on appeal. We therefore decline to consider Duprey's FMLA argument. *See Hasan v. Wolfe Creek Nuclear Operating Corp.*, ARB No. 01-006, ALJ No. 2000-ERA-14, slip op. at n. 4 (ARB May 31, 2001); *Hasan v. Florida Power and Light Co.*, ARB No. 01-004, ALJ No. 2000-ERA-12, slip op. at n. 5 (ARB May 17, 2001). *See also Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 97-ERA-56, slip op. at 4 (ARB Jan. 31, 2001).