UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET SW SUITE 23T85
ATLANTA, GEORGIA 30303-8931

May 12, 2003

EA-00-230

Florida Power & Light Company
ATTN: Mr. J. A. Stall
Senior Vice President of Nuclear Operations
PO Box 14000
Juno Beach, FL 33408-0420

SUBJECT: APPARENT VIOLATION OF EMPLOYEE DISCRIMINATION REQUIREMENTS (U.S. DEPARTMENT OF LABOR ALJ CASE NO. 2000-ERA-5, ARB CASE NO. 00-070)

Dear Mr. Stall:

This is in reference to an apparent violation of NRC requirements prohibiting discrimination against employees who engage in protected activities, i.e., 10 CFR 50.7, Employee Protection. The apparent violation relates to Florida Power and Light Company's (FPL) discriminatory actions against Mr. Donald Duprey at the Turkey Point Nuclear Plant. This apparent violation was discussed with you on May 12, 2003.

The apparent violation is based on a U.S. Department of Labor (DOL) proceeding (2000-ERA-5). The presiding Administrative Law Judge (ALJ) issued a Recommended Decision and Order on July 13, 2000, finding that FPL discriminated against Mr. Duprey in violation of Section 211 of the Energy Reorganization Act. This finding was subsequently reviewed by the DOL's Administrative Review Board (ARB) (ARB Case No. 00-070). On February 27, 2003, the ARB issued a Final Decision and Order, adopting the ALJ's decision. A copy of the ALJ's Recommended Decision and Order, and the ARB's Final Decision and Order, are included as Enclosures 1 and 2, respectively.

The NRC staff has reviewed the DOL findings and concluded that the action taken by FPL against Mr. Duprey resulted in an apparent violation of 10 CFR 50.7. Specifically, the NRC concluded that FPL demoted Mr. Duprey in January 1999, at least in part, because of his engagement in protected activity. The protected activity involved Mr. Duprey's reporting of nuclear safety violations and plant procedural issues to FPL supervisors and to the NRC. Therefore, this apparent violation is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. The current Enforcement Policy is included on the NRC's website at www.nrc.gov/OE. The NRC is not issuing a Notice of Violation at this time; you will be advised by separate correspondence of the results of our deliberations on this matter.

On April 2, 2003, FPL provided its response to the DOL ALJ and ARB decision. In summary, FPL considered enforcement action to be unwarranted for several reasons, including DOL's determination that FPL proved by clear and convincing evidence that it had a legitimate business reason for the personnel action taken, the age of the issue, the unreliability of the hearsay testimony relied upon by the ALJ, and for other reasons. Notwithstanding the reasons set forth

in its April 2nd letter, FPL supplemented its response by letter dated April 23, 2003, which provided a summary of its anti-discrimination policy and the actions it has taken to maintain the existence of a safety conscious work environment at its nuclear sites.

We believe we have sufficient information to make an enforcement decision without the need for any additional information from FPL. However, should FPL wish to provide the NRC any additional information, it may do so via: (1) a written response to the apparent violation, within 30 days of the date of this letter, or (2) a predecisional enforcement conference. If a conference is held, it will be open for public observation. The NRC also will issue a press release to announce the conference. Please contact Mr. Joel Munday at 404-562-4560 within seven days of the date of this letter to notify the NRC of your intended response.

Regardless of whether FPL chooses to provide any additional information prior to an enforcement decision, you should be aware that the NRC relies on the DOL's findings in determining whether a violation occurred when such findings are based on an adjudicatory proceeding. The predecisional enforcement conference is not a forum to relitigate the DOL decision. Therefore, we do not expect you to discuss in any detail, either in a conference or in your written response, the factual conclusions forming the basis for the DOL decision. In addition, FPL's corrective actions were fully documented in your letter to the NRC dated April 23, 2003. Based on our review of this information, the NRC has a sufficient understanding of FPL's corrective actions, and no additional information regarding corrective actions is necessary.

Should you choose to respond in writing, your response should be clearly marked as a "Response to An Apparent Violation" and should include for the apparent violation: (1) admission or denial of the apparent violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved. Your response should be submitted under oath or affirmation and may reference or include previously docketed correspondence, if the correspondence adequately addresses the required response. If an adequate response is not received within the time specified, or an extension of time has not been granted by the NRC, the NRC will proceed with its enforcement decision. As stated above, the NRC notes that FPL's letter of April 23, 2003, fully addresses the corrective actions taken in this matter, and your written response may reference this information as appropriate.

In addition, please be advised that the number and characterization of the apparent violation may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response (if you choose to provide one) will be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at http://www.nrc.gov/reading-rm/adams.html (the Public Electronic Reading Room). To the extent possible, your response should not include any

personal privacy, proprietary, or safeguards information so that it can be made available to the Public without redaction.

Sincerely,

/RA/

Victor M. McCree, Deputy Director
Division of Reactor Projects

Docket Nos. 50-250, 50-251
License Nos. DPR-31, DPR-41

Enclosures:
1. DOL ALJ's Recommended Decision and Order, dated July 13, 2000
2. DOL ARB's Final Decision and Order, dated February 27, 2003

cc w/encls:
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U.S. Department of Labor

Office of Administrative Law Judges
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(856) 757-5312
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DATE: July 13, 2000

CASE NO.: 2000-ERA-00005

In the Matter of

DONALD DUPREY

Complainant

v.

FLORIDA POWER & LIGHT COMPANY

Respondent

Appearances:

Pivnik & Nitsche, Esquires
For Complainant

James S. Bramnick, Esquire
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C.5851 (hereinafter "the Act").

The matter was tried on January 24-25, 2000 and April 4, 2000, and briefs filed by the parties by June 26, 2000.

Complainant charges that Respondent demoted him on January 28, 1999 in retaliation for reporting safety violations to management and to the Nuclear Regulatory Commission (NRC). Such retaliation is said to have been realized by Respondent's selective and disparate application to Complainant of its sick leave policy.

Respondent counters that Complainant's demotion was legal as occasioned solely by his repeated absenteeism in violation of its sick leave policy.

I hereinafter find that Complainant has established a prima facie case of a discriminatory demotion violative of the Act, but that Respondent has shown that it legitimately would have demoted Complainant even if Complainant had not engaged in the protected activity underlying such discriminative demotion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I PRIMA FACIE CASE

There is no question that Complainant[1] engaged in activity protected under the Act, that Respondent was aware of such activity, that Respondent took adverse employment action (demotion) against Complainant, and that an inference has been raised that Complainant's protected activity was the likely reason for the adverse action. Couty v. Dole, 886 F. 2d 147 (8th Cir. 1989).

During his tenure with Respondent,[2] Complainant raised nuclear safety concerns (Tr.[3] 32-36; 67-77), and he raised them forcefully (Tr. 192; 342-46; 385; 397; 453-56; 621-22). Respondent's management clearly was aware of this (Tr. 453-56; 621-24; 751; 759; 772). One instance of Complainant's raising of a safety concern (VCT purge procedure) occurred on November 24, 1998 (Tr. 67-70). Complainant was demoted on January 28, 1999 (R 22). Thus, I find that Complainant's demotion followed this instance of protected activity so closely in time as to permit the drawing of an inference of retaliatory motive. Zessin v. ASAP Express, Inc., Case No. 92-STA-33 (Sect'ry 1/19/93); Williams v. Southern Coaches, Inc., Case No. 94-STA-44 (9/11/95). Beyond this, the more powerful inference of retaliation is drawn from the testimonial assertion of Complainant's co-worker, Scott Meier, that Mr. Stamp[4] told him that Mr. Jernigan[5] told Stamp that "[Complainant] was a thorn in the plant's side and his [Jernigan's] side, specifically. That he [Jernigan] wanted him [Complainant] ... out of the company. And the only way they could go about that legally was attendance-wise." (Tr. 347-8) - see DUAL MOTIVE, infra.

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[1] Who presented as an intelligent, well-informed, credible, and sincere witness.

[2] As an Associate Nuclear Plant Operator, Nuclear Plant Operator and Senior Plant Operator, from February, 1993 to his demotion on January 28, 1999.

[3] References are "Tr." - transcript of hearing; "C" - Complainant's exhibits; "R" - Respondent's exhibits.

[4] Respondent's Nuclear Plant Supervisor

[5] Respondent's Plant General Manager

Accordingly, Complainant has made out a prima facie case of discriminatory demotion.

Noted, is that both parties make much of whether or not Complainant's reporting to the NRC or to Respondent's in-house SPEAKOUT forum, of his view that Respondent's sick leave policy creates a safety hazard because such policy encourages employees who are sick to report to work, is protected activity and/or whether Respondent was aware of such reporting. I view this controversy as a non-issue, because: (1) Complainant himself does not consider such reporting to have played any role in his demotion (Tr. 914-16; 66)[6], and (2) 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 (Tr. 674-5; R 29; R 30), rendering any contrary expression of opinion non-threatening to Respondent.

II
DUAL MOTIVE

The record evidence goes further than establishing (at least inferentially) that Respondent demoted Complainant in response to his protected activity. The evidence also establishes that Respondent demoted Complainant for openly and repeatedly defying its sick leave policy, a legitimate reason, non-violative of the Act.

As noted, Meier testified that Stamp told him that Jernigan told Stamp that Complainant was a "...thorn in ... his side ..."[7] and that the company's attendance policy would be used to get him "...out of the company". I credit Meier's testimony over that of Stamp and Jernigan, who denied that such statement was made, because Meier is still employed by Respondent and has every reason not to testify as he did, while Stamp and Jernigan, high ranking managers of Respondent, have every reason to make their denials to protect their jobs and Respondent's integrity. This credited statement of animus[8] towards Complainant, together with Respondent's awareness of his

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[6] "I think the major part of my harassment which led to my demotion was the fact that I am continually causing work slowdowns and issues that cause ... and cost the company money and time." (Tr. 915). "[I think I was demoted] ... because I brought up a lot of concerns that cost them [Respondent] time and money (Tr. 66). See also Tr. at 207 "... as compared to a lot of other issues ... I think [absenteeism] ... is minor". "I don't think I was singled out for excessive absenteeism, no, I don't." (Tr. 104). See also Tr. at 216 "I think [Respondent's selective use of its sick leave policy to retaliate against me, was used] ... as [Respondent's] means to an end...."

[7] Stamp testified that Complainant was considered a "... pain in the butt to management ...", not because of the substance of the concerns he raised but because of the manner in which the concerns were raised, i.e., adversarial, competitive (Tr. 621-2). Since, however, there is no evidence that Complainant in this regard overstepped the bounds of otherwise defensible conduct, i.e., obscene language, etc., or otherwise abused his status, Dunham v. Brock, 794 F. 2d 1037 (5th Cir., 1986), such mode of expression of concerns cannot form a legitimate basis for adverse action against him.

[8] There is not sufficient proof relative to the exact meaning of Jernigan's statement. That is, the "thorn in his side" could have referred to either protected or non-protected activity, including Complainant's absenteeism. The benefit of doubt here is given to Complainant

protected activity and adverse action close in time to such activity, forms a sufficient factual basis of discriminatory action violative of the Act.

On the other hand, the record is replete with substantial evidence demonstrating Complainant's repeated and open defiance of Respondent's sick leave policy. Complainant's absentee record over the period of four to five years preceding his demotion amply demonstrates regular and continual excessive absenteeism, generating continuous warnings and discipline by Respondent, culminating in the deactivation of his badge for entry into Respondent's premises (Tr. 611-12; 687; 853-4; 872; 897; 901; R 42). The evidence of Complainant's recalcitrance in this regard is credible, consistent and overwhelming. He was throughout continuously counseled and warned in this regard with resultant failure to correct/improve his behavior (Tr. 92-4; 105-6; 124; 152; 457-70; 480-1; 495-8; 581-2; 690; 715-16; 750; 760-62; 769; 788-9; 830; 841-2; 836-9; 856-7; 869-72; R1; 2; 3; 4; 5; 7; 8; 9; 10; 16; 22). That Respondent had valid business/personnel reasons to seriously maintain, implement and enforce its sick leave policy, is evident (Tr. 577-79; 609-10; 629; 748-49; 794). Complainant plainly and knowingly decided to express his disagreement with company policy through behavior violative of the sick leave policy. And he did so with the knowing risk of sustaining the discipline ultimately imposed by the company.[9]

Complainant's insistence that other employees were treated differently or less harshly than he, and that Respondent selectively used the policy against him to retaliate for his protected activity, bears no support in this record. Respondent convincingly established that others, whose absentee records were more grievous than Complainant's and not disciplined and/or disciplined less than Complainant, presented situations where improvement was demonstrated, or the discipline imposed was otherwise proportionately appropriate, or where serious illness justified the absenteeism, such that the (demotion) discipline imposed upon Complainant cannot be considered disparate (Tr. 242-50; 555; 594-5; 677; 717-20; 762-68; 848-9; R 42; R 31; R 32; R 33; R 34).

Accordingly, I do not find that this record supports the proposition of selective application to Complainant of Respondent's sick leave policy, or retaliatory disparate treatment of him in this regard. Complainant was legitimately and appropriately disciplined for continued, regular violation

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insofar as recognition that this statement is some evidence that Respondent wanted him out of its employ. Weighted as such, to be sure, this does not amount to "smoking gun" type evidence in the sense of being accepted as direct evidence of intentional discriminatory behavior.

[9] Respondent's sick leave policy certainly leaves room for discretion with management in its implementation (Tr. 450-1; 794-5). And, it is this aspect of the policy which appears to have offended Complainant and his union, in light of the fact that the union contract (C 3) provides for specified sick leave periods, unfettered by management discretion, at least in Complainant's and the union's view (although, as already noted, this issue was arbitrated in the company's favor).

In his exchange with counsel relative to his view of the sick leave policy (Tr. 207-11), Complainant apparently refuses to accept that application of the policy in his case played any significant role in his discipline (see also Tr. 65-6; 914-5), and, taken in full context, Complainant's attitude appears to be that a superior employee, such as himself, is not appropriately subject to such a "minor" issue as absenteeism.

of Respondent's sick leave policy. As previously discussed, however, Complainant was also demoted for the illegitimate reason of retaliation for his protected activity.[10]

III
LEGITIMACY OF DEMOTION

At all times, Complainant has the burden of establishing that the real reason for his discharge was discriminatory. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993); Thomas v. Arizona Public Service Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20. Williams v. Southern Coaches, Case No. 94-STA-44 (Sect'ry, 9/11/95).

To prevail, a complainant must prove, by the preponderance of the evidence, that respondent intentionally discriminated against him because of his protected activity. Jackson and Roskam v. Ketchikan Pulp Co., Case No. 94-WPC-4 (Sect'ry 3/15/96).

Once the employee shows that an illegal motive played some part in the discharge, the employer must prove that it would have discharged the employee even if he had not engaged in protected conduct Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977). And, such proof must be in the form of "... clear and convincing evidence ..." 42 U.S.C. 5851(b)(3)(D). The courts have recognized such level of evidence to be a higher burden than "preponderance of the evidence," but less than "beyond a reasonable doubt" Grogan v. Garner, 498 U.S. 279 (1991).

I find that the evidence of record, on balance, shows clearly and convincingly that Respondent would have demoted Complainant even if no improper motive existed, i.e. even if Complainant's protected activity had not occurred.

I am particularly convinced of this conclusion by the constant, regular, consistent efforts of Respondent beginning early in Complainant's tenure to impress upon Complainant the significance of his absenteeism record, and Complainant's continual refusal/unwillingness to correct his behavior in this regard (Tr. 92-96; 124; 195; 459-60; 465-9; 611; 749; 856-7; 900-01; R 1-10; 16; 22; 40; 42).[11] Each and every of Respondent's witnesses who were familiar with Complainant's continued defiance of the sick leave policy testified credibly, consistently and corroboratively of such defiance and neglect of improvement. Complainant's refusal to accept responsibility for this behavior does not render same harmless, nor is such behavior insulated from adverse consequences thereby. Complainant, as it were, fought the fight raised by the tension between the sick leave rights as envisioned by himself and his union as against those rights as envisioned by his employer, but not without paying the (legitimate) cost attendant thereto (demotion). The evidence pointing to the importance/significance of Complainant's excessive absenteeism is much too compelling, singular and discrete to ignore insofar as this "dual motive" analysis is concerned. Each and every of the violations and warnings was memorialized in written form beginning early

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[10] Complainant has thus established that Respondent's proffered reason for the adverse action taken against him, i.e. that he was demoted solely for violation of its sick leave policy, is pretextual. Carroll v. Bechtel, Case No. 91-ERA-46 (2/15/95).

[11] Complainant admits, for example, that he simply failed to bring in a doctor's note he knew was required for him to be paid for several sick day absences. Tr. 124; 152; 842; R 9.

in Complainant's employ. Each and every of his new superiors was confronted with his dismal record and began efforts to improve on such record upon assuming responsibility for Complainant. That many management people were, early on and continually, concerned with and looking at his attendance problems, is clearly demonstrated in this record. This striking, long-standing and documented focus upon Complainant's attendance record simply demands predominant and controlling attention, and clearly overwhelms as mere distraction the proposition that Respondent would not have demoted Complainant in the absence of his protected activity.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend the complaint be DISMISSED.

RALPH A. ROMANO
Administrative Law Judge

DATED: July 13, 2000
Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

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.

JURISDICTION AND STANDARD OF REVIEW

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[1] 42 U.S.C. § 5851 (1994).

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 raised safety

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[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 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).

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]

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

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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.

14 TR 629, 748-49.

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 policy to Duprey and had not treated other absenteeism offenders less harshly. As a result, the ALJ found the evidence

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[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 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.

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 Dupery did not consider the reports to have played a role in the demotion.[26]

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

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[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.

[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.

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 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

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[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.

[33] Respondent's Brief at 5.

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]

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

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[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.

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

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 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

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[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.

[46] TR 102-05, 129-30, 206-13, 672-73.

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]

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[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 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-

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

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).