



In the Matter of:

THOMAS J. SAPORITO, JR.

ARB CASE NO. 98-008

COMPLAINANT,

ALJ CASE NOS. 89-ERA-7

89-ERA-17

v.

DATE: August 11, 1998

FLORIDA POWER & LIGHT COMPANY

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case, arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988),^{1/} was remanded to the Administrative Law Judge (ALJ) after the Secretary found that “[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the ‘chain of command’ to speak directly with the Nuclear Regulatory Commission is protected [from discrimination under the ERA].” Secretary’s Decision and Remand Order (Remand Order) at 1. The Secretary held that “[c]overed employers who discipline or discharge an employee for such conduct have violated the ERA.” *Id.* Further, the Secretary found that Respondent Florida Power and Light Company (FP&L) violated the ERA when it discharged Complainant Thomas Saporito (Saporito) for three reasons, one of which was his protected refusal to reveal his safety concerns to FP&L managers and his insistence on speaking directly to the NRC. *Id.* at 6. The Secretary directed the ALJ to review the record and submit a new recommended decision on whether FP&L would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *Id.*^{2/}

^{1/} The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 25, 1992), do not apply to this case in which the complaint was filed prior to the effective date of that Act.

^{2/} The Secretary also denied FP&L’s motion for reconsideration of the Remand Order, noting that the decision did not preclude FP&L from proving on remand that it would have discharged Saporito for legitimate reasons even if he had not engaged in protected activity. Order, Feb. 16,

(continued...)

The case then was assigned to a new ALJ, who held another evidentiary hearing and found that FP&L proved that it would have taken the same action even if Saporito had not engaged in protected activity. Recommended Decision and Order on Remand (R. D. and O.) at 32. In a lengthy decision, the ALJ explicitly held that “either of the . . . two [unprotected] insubordinate acts itself would have justified . . . Saporito’s termination.” *Id.* at 33. For the reasons discussed below, we agree with the ALJ, and dismiss the complaints.

BACKGROUND

I. Facts

Saporito worked for FP&L from 1982 to December 22, 1988, in various positions at several of its nuclear and non-nuclear power plants, transferring frequently from one plant to another and from job to job under the job bidding system of the collective bargaining agreement. *See* Respondent’s Exhibit (R) 50, attachment 2. Saporito transferred to the Turkey Point nuclear plant from the St. Lucie, Florida, nuclear plant on April 23, 1988, as an Instrument and Controls (I&C) Specialist. *Id.*^{2/}

At Turkey Point Saporito filed numerous grievances over a variety of issues.^{4/} He also posed questions -- internally to FP&L, to the Nuclear Regulatory Commission, and to an organization of nuclear power plant operators known as the Institute of Nuclear Power Operations^{5/} -- about whether FP&L followed proper procedures. *See* T. (Transcript of original hearing) 745; 891; 895; Complainant’s Exhibit (C) 24. Saporito also raised questions about the competency and mental stability of two supervisors after he had disagreements with them. T. 787; 792; 802-803; 1147-50.

In November 1988 John Odom, the site Vice President at Turkey Point, decided to engage a private law firm to investigate Saporito’s charges regarding the mental instability of the two supervisors, as well as Saporito’s charges of harassment and intimidation. T. 1156-57; 1418-24. Saporito refused to cooperate with this investigation until all his outstanding grievances were resolved. T. 1172; 1428; RT. (Transcript of hearing on remand) 476. Odom decided to attempt to settle the grievances personally so that Saporito would talk to the outside investigators. T. 1433;

^{2/}(...continued)
1995.

^{3/} Saporito bid on but was not awarded a transfer back to St. Lucie as an I&C Specialist in May 1988. The position was awarded in July 1988 to an employee with less seniority than Saporito, and Saporito filed a grievance over this denial of job award. *See* R-50 and discussion in text below.

^{4/} By Saporito’s own count, he had filed 35 to 40 grievances in approximately six months. T. 1172.

^{5/} INPO was established by the nuclear power industry to police itself after the Three Mile Island accident. T. 1967.

1435. Odom scheduled a meeting with Saporito for November 23, 1988, to review his grievances and try to settle them. T. 1437. Two days before the meeting, Odom learned that Saporito had nuclear safety concerns. T. 1438; RT. 486.

The November 23 meeting took almost all day. Some of Saporito's grievances were settled, but Odom could not settle Saporito's grievance over the failure to be awarded the job at the St. Lucie plant because Saporito demanded payment of \$500,000 in damages. T. 1438E; 1438G. Toward the end of this meeting, Odom asked Saporito if he had any nuclear safety concerns. T. 1438G-1438H. Saporito answered in the affirmative, but said he would only reveal his safety concerns to the Nuclear Regulatory Commission. After asking Saporito several times to tell him his safety concerns, Odom issued a direct order that Saporito tell his concerns to the NRC as soon as possible. T. 1438J. Saporito requested access to many of the Plant Work Orders (PWO) in order to prepare a report to the NRC about his safety concerns. T. 1438I.

Following the meeting, Maintenance Superintendent Joe Kappes reported to Odom that several union representatives had told him they were concerned that Saporito did not really have any safety concerns, but that he might try to create some. Odom therefore decided to restrict Saporito from access to vital areas of the plant. T. 1438M -1438N; 2016-2017; RT 109.

Odom met with Saporito again on November 28 and 29 and settled all of his outstanding grievances. T. 1438T-1439. Saporito was to be transferred to the St. Lucie plant. However, the transfer was delayed two weeks in order to give Saporito time to speak with the outside investigators at Turkey Point. T. 1439; RT. 110. FP&L also agreed to pay Saporito \$100 per day for each day he would have been working at St. Lucie if he initially had been awarded the St. Lucie job. T. 1440. In order to accomplish this settlement, Odom persuaded the Senior Vice President of Nuclear Operations to require St. Lucie to accept Saporito's transfer. T. 1441; RT. 111, 380.

On November 30 Odom learned that Saporito had begun to discuss his nuclear safety concerns with the outside investigators FP&L had hired. Therefore, Odom thought that Saporito would reveal his safety concerns to him. T. 1444; 1447; RT. 117-18; 619. Odom felt an obligation as site Vice President to learn what Saporito's safety issues were as soon as possible in order to take action on them if necessary. T. 1447; RT. 118. He also wanted to arrange Saporito's access to the PWOs so that Saporito could prepare his report to the NRC. T. 1443-44; RT. 112; 619. Finally, because Odom was unsure whether Saporito understood what a nuclear safety issue was, he wanted to discuss that issue with Saporito as well.

Therefore, Odom told Kappes to inform Saporito that Odom wanted to meet with him. T. 1448. Kappes asked Jerry Harley, the I&C Production Supervisor, to find Saporito and tell him about the meeting. T. 1793; 2024. Harley found Saporito in the I&C shop around 5:00 PM and told him that Odom wanted to meet with him to discuss Saporito's safety concerns. Saporito at first replied that he did not have any safety concerns. T. 1794. Harley told Saporito to be prepared to holdover (stay at work beyond his regular quitting time) to attend the meeting with Odom. Saporito then said he would not holdover because he had to attend to personal family business. *Id.* Harley told Kappes that Saporito said he did not have any nuclear safety concerns and refused to holdover for the meeting. T. 1795; 2024.

When Kappes told Odom about Saporito's response, Odom said he still wanted to have the meeting. Kappes then went to the I&C shop and told Saporito to come to the meeting with Odom. T. 2025. Saporito at first refused to come to the meeting, reiterating that he had personal family matters to address. T. 2026. When Kappes again ordered Saporito to holdover for the meeting, Saporito said he was sick and would not stay. T. 2027; RT. 119-120. After Saporito refused several times to holdover, Kappes concluded he had to respond to Saporito's defiance of a direct order in front of other employees. Therefore, Kappes told Harley that Saporito was suspended until further notice for defying an order, and that Harley was to take Saporito to the gate and take his badge. T. 2027-29. This incident occurred at about 5:15 or 5:20 PM on November 30. T. 2030.

When Kappes told Odom about this incident, Odom believed he had to support Kappes in his disciplining of Saporito for his act of "gross insubordination." RT. 121. However Odom also felt that it was necessary for Saporito to return to the plant so that he could continue talking with the outside investigators. T. 1453. Odom told Kappes to hold the suspension in abeyance and get Saporito back to the plant. T. 2034. Kappes called Saporito the next day; however, Saporito said he would be out sick until December 12 for medical disorders related to stress. T. 1254; 2035; RT. 124.

Odom decided to order Saporito to be examined by a company doctor because Odom wanted to learn whether Saporito's claim of being too ill to attend the November 30 meeting was legitimate and to determine if Saporito was physically fit to perform the duties of his job. T. 1454; 1456; RT. 124. When Saporito returned to work on December 12, he refused to see or be examined by a company doctor. T. 2042. The next day, Saporito suggested to Kappes that the company doctor speak with his doctor as a way of resolving these issues. Kappes agreed on the condition that the company doctor found the communication with Saporito's physician sufficient to make a determination regarding Saporito's medical condition. T. 2048-49.

Kappes learned the next day that the company doctor, Dr. Richard Dolsey, had concluded that he still needed to examine Saporito to give his opinion whether Saporito had been too ill to attend the November 30 meeting with Odom and whether he was physically fit to perform the duties of his job. T. 2050. When Odom learned this, he decided it was still necessary to order Saporito to be examined by Dr. Dolsey. Saporito was directed to be examined by the doctor on December 16. Saporito said he would go to the doctor's office but would not permit the doctor to examine him. T. 2051. On December 16 Kappes and Odom received word that Saporito had gone to the doctor's office but had refused to be examined. T. 2053; RT. 127; *see also* T. 836; RT. 790.^{6/}

Odom concluded that Saporito's refusal to be examined by the company doctor was another act of insubordination and decided to discharge Saporito. T. 1482; RT. 127. The discharge notice

^{6/} Dr. Dolsey wrote a detailed letter to FP&L explaining what happened when Saporito came to his office on December 16, which corroborates what Odom was told about the outcome of Saporito's visit to the doctor's office. Dr. Dolsey reported that Saporito "said very vehemently that he would not allow [Dr. Dolsey]" to examine him. R-115. A union representative, who accompanied Saporito to the doctor's office and sat with him in the examining room, confirmed to Odom that Saporito refused to be examined. T. 1589.

gave three reasons for firing Saporito: 1) refusal on November 23, 1988, to comply with Odom's order to provide information about activities at the plant that could affect public health and safety, for which Saporito's access to vital areas and radiation controlled areas was restricted; 2) refusal to hold over for a meeting with Odom on November 30, 1988, for which Saporito was suspended indefinitely; and 3) refusal of an order on December 16, 1988, to be examined by the designated company doctor. R-104.

II. ALJ Decision

The ALJ held, consistent with the Secretary's Remand Order, that the only issue to be decided on remand was whether FP&L proved that it would have taken the same action against Saporito even if he had not engaged in protected activities. He concluded that FP&L carried its burden of proof. R. D. and O. at 32. The ALJ found that "either of the latter two insubordinate acts [*i.e.*, refusal to attend the November 30 meeting with Odom and refusal to follow the order to be examined by the company doctor] by itself would have justified Saporito's termination," and that "the evidence overwhelmingly compels this result when the two instances of insubordination are considered as a whole." *Id.* at 33.

The ALJ found that Saporito's reasons for not attending the November 30 meeting were "dubious, if not outright unbelievable." R. D. and O. at 35. Saporito's "shifting excuses" for not attending the meeting showed that Saporito lied to Kappes. *Id.* at 37. The ALJ concluded that, even if the refusal to attend the meeting had some protected aspect because one purpose of the meeting was to learn Saporito's safety concerns, Saporito "exceeded the bounds of protected conduct [when he] *blatantly lied* as to his reason for not following that order." R. D. and O. at 37 (emphasis in original). He also found that Saporito was "insolent" and mocked management by the manner in which he stated his refusal to attend the meeting. *Id.* at 36.

With regard to Saporito's refusal to be examined, the ALJ found that FP&L clearly explained to Saporito several times the reasons for requiring him to be examined by Dr. Dolsey, that they were valid reasons, and that the order would have been given even if Saporito had not engaged in protected activity. R. D. and O. at 39-41. The ALJ also rejected Saporito's argument that FP&L "orchestrated" the sequence of events leading to the order that Saporito be examined as a means of "luring" him into insubordination for which he could be discharged. R. D. and O. at 42. He found that FP&L could not have known that Saporito would refuse to attend the meeting with Odom on November 30, that Saporito would give as a reason for not attending that he was sick, that he would be on sick leave for almost two weeks, or that Saporito would refuse to be examined by Dr. Dolsey. *Id.*

The ALJ concluded that Odom would not have gone to the trouble of arranging a transfer to the St. Lucie plant if he wanted to "set-up" Saporito for termination. R. D. and O. at 43. He also found that FP&L acted in good faith by agreeing to a telephone conversation between Dr. Dolsey and Saporito's doctor. *Id.*

The ALJ also concluded that FP&L did not fail to follow its progressive discipline policy with Saporito because Saporito was warned about the consequences of failure to attend the meeting

with Odom and was first suspended for his refusal. R. D. and O. at 44. The ALJ relied on evidence that other employees received substantial discipline, including discharge in two cases, for insubordination. The ALJ concluded that Saporito's "repeated insubordination," which went beyond the bounds of protected activity, was the cause of his termination, and that FP&L proved that these acts of insubordination "would have led to Saporito's termination even if he had not insisted on his right to speak directly with the NRC." R. D. and O. at 45.

DISCUSSION

I. Procedural Issues

A. Timeliness of Respondent's Reply Brief

Because Saporito's initial brief did not conform to the type size and style limitations of the briefing schedule, FP&L was given an opportunity to file a longer reply brief within 30 days of receipt of the order granting the right to file such a brief. Saporito argues that FP&L's reply brief was untimely filed because he received a copy of the Board's order on February 24 and FP&L's brief was filed with the Board on March 27, that is, 31 days later. However, FP&L stated in its response to Saporito's motion that it received the order granting leave to file a longer reply brief on February 25, and the return receipt for delivery of the order by certified mail shows a delivery date of February 25. FP&L's reply brief was timely filed.

B. Motion to Strike Part of FP&L's Reply Brief

Saporito also moved to strike a portion of FP&L's reply brief that asserted that FP&L was not allowed to introduce evidence about Saporito's employment history with FP&L before he arrived at the Turkey Point nuclear plant in April 1988. That portion of FP&L's brief was simply a statement of its disagreement with the ALJ's ruling. Saporito's motion to strike is denied.

C. Motions for Remand and Reconsideration

Saporito moved to remand the entire case to give him an opportunity to amend his complaint to cover events that occurred at the St. Lucie nuclear power plant before he arrived at Turkey Point in April 1988. Those events occurred long before the ERA's then 30 day statute of limitations, and any action on them is now time barred. The motion to remand is denied.

Saporito also moved for reconsideration and remand of Case No. 89-ERA-07, which alleged that FP&L engaged in harassment of Saporito for his protected activity. That motion and accompanying memorandum only repeats arguments raised before the Secretary. In his June 3, 1994 Decision and Remand Order, the Secretary adopted the ALJ's conclusion that the alleged acts of retaliatory discipline and harassment "were not 'causally related to . . . [Saporito's] protected activity.'" Slip op. at 3. The motion for reconsideration and remand of Case No. 89-ERA-07 is denied.

D. Motion to File Second Rebuttal Brief

Saporito also moved for leave to file a second rebuttal brief to respond to new arguments raised in FP&L's second reply brief. That motion is granted.

II. The Merits

The Secretary held in his Remand Order that when FP&L discharged Saporito, it was motivated, at least in part, by an illegitimate reason: Saporito's refusal to reveal his safety concerns to Odom on November 23. R. O. at 6-7. The issue before us now is whether, under the dual motive analysis which is applicable under the circumstances of this case, FP&L has proven that it would have discharged Saporito even if, on November 23, he had not insisted on his right to reveal his safety concerns only to the NRC. *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (Dual motive test set forth in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), applies where it was "undisputed" that complainant engaged in protected activity and "that this was a motive for disciplinary action"); *Passaic Valley Sewerage Commissioners v. United States Dep't of Labor*, 992 F.2d 474, 481 (3d Cir.), *cert. denied*, 114 S.Ct. 439 (1993). We agree with the ALJ that FP&L has carried this burden. We turn to an examination of each incident to determine whether Saporito's conduct gave FP&L legitimate grounds for discharge.

A. Refusal to Holdover and Attend Meeting with Odom

Odom decided he wanted to meet with Saporito on November 30 for three reasons: to discuss the conditions under which Saporito would be provided the Plant Work Orders he had requested; to determine whether Saporito actually understood what a nuclear safety concern was; and to ask Saporito what his concerns were because Odom had learned that Saporito had begun to reveal those concerns to the outside investigators and thought that Saporito might be ready to reveal them to Odom. T. 1444; RT. 117-18.

The information Odom received about Saporito's response was that Saporito, in front of other employees, had refused to meet with Odom after being given a direct order by both Harley and Kappes. T. 1794-95; RT. 120. Odom also learned that Saporito had given changing reasons for refusing to attend the meeting: first that he had no safety concerns; then that he had personal family matters to attend to; and finally that he was sick. In light of Saporito's shifting justifications for his refusal to holdover to attend the meeting with Odom, Saporito's refusal appeared to Odom to be a clear act of insubordination. T. 1451. We agree with the ALJ that FP&L could have discharged Saporito for that reason alone.

In this regard we find it significant that FP&L did not immediately discharge Saporito after the November 30 incident, but instead suspended him. Indeed, FP&L proved that Saporito's suspension was consistent with discipline (including discharge, suspension, and demotion) it had meted out to other employees under similar circumstances. *See* R-111.

We also reject Saporito's argument that by refusing to attend the meeting with Odom, Saporito was insisting on his right to reveal his safety concerns only to the NRC. First, Saporito

never stated as a reason for not attending the meeting with Odom that he did not want to be interrogated about his safety concerns.

Second, the mere fact that one of Odom's objectives in meeting with Saporito was to ask again about Saporito's safety concerns did not insulate Saporito from all directives given by his employer. "Even when an employee has engaged in protected activities, employers legitimately may discharge for insubordinate behavior, work refusal, and disruption." *Abu-Hjeli v. Potomac Electric Power Co.*, Case No.89-WPC-1, Sec'y Dec., Sept. 24, 1993, slip op. at 17, citing *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986). This is not a situation in which an employee's alleged insubordination was "the result and manifestation of his protected activity." *Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Sec'y. Dec., Sept. 22, 1994, slip op. at 15-16. Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns;²⁷ however, because of Saporito's refusal to meet with Odom, this scenario is not before us.

A situation similar to this case arose in *Yule v. Burns Int'l. Security Service*, Case No. 93-ERA-12, Sec'y. Dec., May 24, 1995, where an employee who had engaged in protected conduct refused to follow an order to sign a training document indicating she had received it and understood its contents. The Secretary held that the respondent proved it would have discharged the complainant for this insubordination even if she had not engaged in protected activities. *Yule*, slip op. at 13-14. The Secretary in *Yule* found that the employee did not make a statement that signing the training document was a "cover-up to the NRC," and that his analysis would have been very different if the employee had made such a statement. *Yule*, slip op. at 10 and n.8. Similarly, our analysis in this case would also have been different if Saporito had gone to the meeting with Odom but refused to reveal his safety concerns when asked. However, in the circumstances of this case, the ERA does not protect him from disciplinary action for refusing to attend the meeting at all.

Saporito also argues that the reason he did not want to meet Odom on November 30 was that he did not want to be questioned about his safety concerns, and that he feared retaliation and harassment. But Saporito himself testified that the reasons he gave Kappes for not attending the meeting were that he had family business to attend to and that he was sick, not that he did not want to be questioned about his safety complaints. T. 919-20.

Finally, Saporito cites National Labor Relations Act cases to support his argument that Odom's request that Saporito meet with him violated the ERA because that order tended to coerce Saporito into refraining from exercising his rights under the Act. The courts have applied a multi-

²⁷ In his Remand Order, the Secretary held that Saporito's attempt to by-pass the employer's "chain of command" in favor of speaking directly with the Nuclear Regulatory Commission was protected by the ERA. Remand Order at 1. *See also*, Sec. Order, Feb. 16, 1995. However, we note that by the time Saporito refused to meet with Odom on November 30, 1988, he had already begun meeting with FP&L's outside investigators with regard to his safety concerns. The Secretary did not reach the issue whether an employee, having initiated discussions with the company or the company's agents with regard to environmental or nuclear safety concerns, may then abruptly refuse to cooperate in reporting safety concerns absent unusual intervening circumstances.

factor test to determine whether employer interrogation about protected activities tends to be coercive. One of the factors to be considered is whether the employer had a valid purpose in questioning the employee. *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 928 (5th Cir. 1993). In *NLRB v. Brookwood Furniture Div. of U.S. Indus.*, 701 F.2d 452, 460-462 (5th Cir. 1983), the court held that questioning of employees about union activities is not illegal *per se*, and noted that in none of the alleged instances of coercive interrogation did the employer have a valid purpose for questioning employees about their support for a union. Here, Odom clearly had a valid purpose in wanting to question Saporito about his safety concerns: to learn whether any of those concerns had immediate significance for public health and safety. Moreover, Odom had other valid reasons to need to speak with Saporito, most important his need to set up a procedure for Saporito to have access to the PWOs. We hold that Odom's attempt on November 30 to question Saporito about his safety concerns and to meet with him about making the PWOs available did not have the effect of coercing Saporito into refraining from exercising his right under the ERA to contact the NRC about his safety concerns.

In light of Saporito's shifting explanations for his refusal to meet with Odom, and his failure to invoke any legitimate ERA-related reason for declining to meet, FP&L has established that Odom was justified in taking disciplinary action against Saporito for his refusal to meet with Odom.

B. Refusal to be Examined by Designated Doctor

Saporito gave different reasons for refusing to meet with Odom on November 30, saying first that he had to attend to family matters and then stating he was sick and could not stay for the meeting. This inconsistency raised questions in Odom's mind about whether Saporito was in fact too ill to meet with him; it impressed Odom as a "fabrication." RT. 788. Saporito then told Kappes the next day that he would be on sick leave until December 12 for medical disorders related to stress. Odom reasonably became concerned about Saporito's physical ability to perform his job and decided Saporito should be examined by the designated company doctor.

Later Odom was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctor's office, that Saporito had refused to be examined by the doctor.^{8/} RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which, taken together with the refusal to meet with him on November 30, appeared to Odom to be gross insubordination. Odom believed that Saporito's behavior of picking and choosing which orders would be obeyed could not be tolerated. T. 1483; RT. 797. Although Odom was aware that firing Saporito might look bad under the circumstances, he felt that the potentially negative impact of the discharge was outweighed by the gravity of Saporito's insubordination, which was common

^{8/} Saporito argues that he never explicitly refused to be examined. The record shows that Saporito did not *say* explicitly that he refused to be examined, but his *actions* in repeatedly asking the doctor questions had the same effect. The doctor told the FP&L representative who accompanied Saporito to the doctor's office that Saporito had refused to be examined and testified to that effect at the first hearing. T. 628-630. Under the circumstances, FP&L was justified in concluding that Saporito had refused the examination.

knowledge at the plant and which would set a bad precedent if not addressed by management. RT. 769; 797.

Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. First, FP&L did not know in advance that Saporito would refuse to be examined. In addition, if Odom and Kappes were trying to set up Saporito, they would not have agreed to his proposal that the company doctor speak with his doctor about her findings. They also would not have agreed that a third doctor would be consulted if the designated company doctor and Saporito's doctor disagreed on their findings. At each step in this process, the outcome would not have been in the control of FP&L and could have turned out favorably to Saporito. In addition, if Odom intended to fire Saporito, it is not likely he would have gone to the trouble, and expenditure of political capital, to arrange Saporito's transfer back to the St. Lucie plant.

This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas*, slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to the examination. *Diaz-Robainas*, slip op. at 20. In this case, in contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended sick leave for medical disorders which he asserted were related to stress.

We join the ALJ in finding that FP&L has proven by a preponderance of the evidence that it would have discharged Saporito for his insubordination in refusing to attend a meeting with Site Vice President Odom and refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. Accordingly, the complaint in this case is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member