U.S. Department of Labor

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Issue Date: 23 May 2006

JAMES F. NEWPORT 2005-ERA-00024
Complainant

v.

FLORIDA POWER AND LIGHT COMPANY
Respondent

RECOMMENDED DECISION AND ORDER

DISMISSAL OF CLAIM

This case is brought pursuant to the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 and implementing regulations found at 29 CFR Part 24, and the Rules of Practice and Procedure for Administrative Hearings. Those rules include 29 CFR § 18.36, Standards of Conduct:

> (a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.
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> (b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The administrative law judge shall state in the record the cause for suspending or barring an attorney or other representative from participation in a particular proceeding. Any attorney or other representative so suspended or barred may appeal to the Chief Judge but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

29 CFR § 18.29, authority of administrative law judge, states in part:

> (a) General powers. In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following:
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> (5) Issue decisions and orders;
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> (6) Take any action authorized by the Administrative Procedure Act;
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> (7) Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefor;
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> (8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072; and

(9)Do all other things necessary to enable him or her to discharge the duties of the office.

(b) Enforcement. If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

The Claimant is pro se. He had been advised on several occasions that he has a right to representation, but continued to represent himself. Respondent is represented by Mitchell Ross, Esquire and Julie S. Holmes, Esquire, Florida Power and Light, Juno Beach, Florida. A hearing was held in Miami from March 22 to March 24, 2006.

Findings

On or about February 28, 2006 I received Respondent's Emergency Motion for an expedited Telephone Conference. The Motion alleged that the Complainant became "belligerent and obscene" with Respondent and asked me to dismiss the claim. Among the allegations alleged included repeated threats to pursue criminal action against Respondent and its witnesses in an attempt to coerce Respondent to settle with Complainant and directly contacting supervisory personnel with knowledge they are represented by counsel. Attached were excerpts from depositions and from pleadings. Respondent alleged that some of the documents Complainant submitted to opposing counsel contained profane language and sexual innuendoes.

Among the allegations were threats made by Complainant to witnesses, veiled and otherwise. Included was the following colloquy:

Complainant : I shot a man in the parking lot at work.

Q: You shot a man with a gun?

Complainant : Yes, a real gun.

Q: And why did you do that?

Complainant : That's a pretty good reason, I think that's - - that's one of the better ones for being fired.

Q: You seem particularly proud of that.

Complainant : I blasted him dead square In the ass.

Complainant Deposition p. 251.

The shooting incident happened prior to this case. Most of the alleged threats were made while the Complainant was residing in either California and Missouri, and the witnesses and counsel were in Florida.

On March 1, 2006, I held a telephone conference. Part of the colloquy is as follows:

JUDGE SOLOMON: Well, to be quite honest with you, there are threats that are involved. I do not have you under oath. You have the right to have an attorney [to] represent you. You have not exercised that right. I had told you about that before, both in pleadings and in another phone hearing that we had. Anything you say has the potential of being used against you later on. You understand that?

MR. NEWPORT: Yes, sir. I understand that. And if you take a careful reading. Now here's what I have to say about the issue. You take a careful reading in context of every word that could be related to a threat. I understand It that the only threat there is in there is to respond by going to law enforcement and asking them to enforce the rules on perjury, mail fraud and wire fraud.

JUDGE SOLOMON: Well, I read through your materials and I read through some of the transcripts. For example, when you say that you have the capacity to shoot somebody in the rear end and then you say that you had done that before, I don't know how to take it. Let me just ask you, your [sic] not under oath, but let me ask you. Have you ever been convicted of a fraud or anything related to fraud, or anything relating to the shooting that you had talked about in your materials?

MR. NEWPORT: No, sir. In fact, I was involved in a shooting. I did shoot a man in the ass with a real gun and he was assaulting a female employee of mine….

Transcript of March 1 proceeding "TR 3/1" at 7-8.

During the telephone conference, I read the text of the rule on standards of conduct to the Complainant, 20 CFR § 18.36. Tr 3/1, at 6.

Complainant's written response includes direct and tacit admissions that he had made threats to bring criminal actions against witnesses and made profane statements to witnesses and to counsel. One can infer that the threats include physical threats. In the telephone conference, he admitted that he had used profanity toward Respondent's attorneys. Id. 11, 13. The Complainant agreed to be civil. Id. at 9, 22. I directed him not to be obnoxious. Id. at 11.

I told the Complainant not to threaten anyone again and that any further threat could warrant dismissal. Id 30.

This case came to hearing on March 21, 2006 in Miami. During the hearing, Complainant made gestures to some of the witnesses. At one point, I cautioned him not to point his finger at one of the witnesses, who apparently felt intimidated. Tr, 424.

During the questioning by Mr. Ross, Respondent's counsel, Complainant admitted that he had made profane statements, threatening language and sexual references to his co-counsel during discovery. Id. 922.

Manny Misas had been called by Complainant and testified that certain safety related records had been kept. This testimony substantiated a claim made by Complainant that the Respondent had destroyed records relating to this case. Complainant had requested that I invoke summary decision on his behalf due to spoilage of evidence. However, counsel for Respondent announced that Mr. Misas was subject to recall and would recant his direct testimony.

On March 23, 2006, I was advised by counsel that during a hearing recess outside the courtroom Complainant was seen drawing a finger across his throat, "as if Complainant was going to slit the throat of a witness", Mr. Misas.

On the record, the following colloquy occurred:

Mr. Ross, Respondent's counsel :

Have you physically threatened any FPL witnesses during this proceeding?

A: No.

Q: Did you see Manney [sic] Misas in the hallway yesterday at 4:00 p.m. on the 14th floor of this courthouse?

A Yes, I walked by him.

Q When you walked by him, did you make a gesture to Mr. Misas?

A Yeah. I went like -- probably like that.

Q Like this? The record indicates that you drew -- or, you took your finger, and you moved it across your throat, correct?

A Yeah, that's how I feel about being here. This is not fun for me.

Q Mr. Misas said hello to you, didn't he?

A I don't know exactly what he said, but they were words to that effect, yeah.

Q And that was your response, to draw your finger in across your throat as if you were indicating slitting somebody's throat?

A You can make the most negative interpretation of everything. I didn't want to speak with that man. I wasn't wanting to speak with your witnesses before they get up on the counsel to be sworn, and, frankly, you should have instructed him not to talk to me.

But it was no threat. There was no threat to Manney [sic] Misas. We're -- you know, I think I went through a metal gate, metal detector, okay? Now, if you want to inflate every single gesture I make, want to put me in bars, right behind bars now, because it's not -- there's no what-do-you-call-it, there's a whole bunch of rules on threats, but there's no threat.

Q So your concern when Mr. Misas said hello to you was that you didn't want to talk to him before he took the witness stand?

A I'd prefer not. Well, just because look what's going on right now, and I'm speaking --

Q Answer my question.

A Sir?

Q Just answer my question. You said --

A Yes in part, yes in part.

Q Okay.

A I don't want to speak to your witnesses until they get up here.

Q And Mr. Misas said hello to you, correct?

A Words to that effect.

Q You couldn't have just said, Mr. Misas, I prefer not to speak to you right now?

A That's a hypothetical, but, yeah, I'll answer it anyway.

Q Or just ignore him?

A I would prefer to just ignore him.

Q You instead had to draw your finger across your throat?

A A lot of times I go like this. It's how I feel about being here. I don't want to be here. I don't want to be here. I'm compelled to be here to protect my interest and my family's. But if you think I like coming down here, it drives me nuts to be down here.

JUDGE SOLOMON: All right, there was a gesture made, and I want the record to state what the gesture was. What was that gesture?

THE WITNESS: It's like a finger across the throat, Your Honor.

JUDGE SOLOMON: No, the other gesture.

THE WITNESS: Oh, that's to be choked.

MR. ROSS: The strangling gesture?

THE WITNESS: Yeah. Well, the thing is, Manney [sic] didn't say, oh, wait a minute, are you threatening me. That's how I feel about being here. And, if you're just trying to look into my mind, you know, that's how I feel about being here.

Tr, 924 – 927.

I asked the Complainant about this allegation.

Q: Did you threaten Mr. Misas?

> Complainant: No, sir, that was not a threat. I make gestures that were referring to me. I feel kind of hung here. You know, I got chewed out a little bit, like I properly deserved to be chewed out about being late on documents, being late -- all, just getting this thing prepared. That was about me.
>
> Now, he -- Mr. Misas, I have never had any bad words with him. I don't like what he's doing and what he's saying. I don't think he's not a very good committeeman, but we haven't a bad relationship, and I've never had any threats with him.

Tr 1154.

Mr. Misas testified that he felt threatened by Complainant's gesture. Id, 1181.[1]

On or about April 19, 2006, Respondent renewed its Motion for Sanctions and requests dismissal.

In response, Complainant filed a Motion requesting an "Open Court Hearing" and requests that it be held in Kansas City, Missouri. He responded to the allegation that he threatened Mr. Misas as follows:

> Complainant strenuously denies he admitted conduct that communicated a threat to slit the throat of Mr. Misas or threaten Misas in any way. The transcripts of the March 24, 2006 hearing clearly will show this.

He further states:

> Complainant's position is that this allegation against Complainant is the fanciful creation of a malicious imagination of Manny Misas if not the willful subordination of perjury by opposing counsel to continue Respondent's reckless acts of perjurious discrimination in the Court, Manny Misas is just one more example of the deliberate misconduct of self-serving PERJURERS like David London, Edwin Sanchez, James Gallagher and Timothy Panoff infecting Florida Power and Light Company nuclear safety program with untrustworthy persons who are an absolute menace detrimental to the public safety.

After a review of the evidence, I find that Complainant made threatening conduct toward Mr. Misas in the hallway, admitted under oath during the hearing on March 24, 2006. He admitted that he had made the gesture when questioned by Mr. Ross. And he admitted that he made the gesture when I questioned him. "It's like a finger across the throat…." Tr, 927. This is

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[1] BY MS. HOLMES:

Q Good afternoon, Mr. Misas. Thanks for being so patient. Did you see Mr. Newport in the hallway yesterday outside of the courtroom?

A Yes, I did.

Q Did he make any kind of gesture toward you?

A Yeah, he made what I took to be a threatening gesture where he run his finger to his throat when he looked at me.

Q Did you say anything to him prior to that gesture?

A I just said hello.

Q Did you take that gesture to be a threat?

A Yes, I did.

Q Did that make you uncomfortable?

A Very.

Tr, 1181.

substantiated by the representation by Respondent's counsel and by the testimony of Mr. Misas. I also find that Complainant's response to me in the colloquy at TR 1154 is a rationalization.

I further find that the gesture, the finger across the throat, is competent to instill a threat. I also find that Complainant is not credible that the threat was made in the presence of a Court Security Officer (CSO), or that a CSO was nearby and that, therefore, any threat was meaningless.[2]

Moreover, I find that the Claimant is not credible regarding his reasons for making the gesture. The Claimant was advised, on several occasions, not to threaten the opposing party or its witnesses. He was, in fact, given a second chance over the objections of opposing counsel.

Sanction Authority

After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are functionally equivalent to other Federal trial judges. ***Butz v. Economou***, 438 U.S. 478 (1978); ***Federal Maritime Com'n v. South Carolina State Ports Authority***, 535 U.S. 743 (2002); see also, ***Rhode Island Dept. of Environmental Management v. United States***, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

Department of Labor administrative law judges have the "inherent power" to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." ***Somerson v. Mail Contractors of America***, ARB No. 02-057 (2003); ***Somerson v. Mail Contractors of***

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[2] JUDGE SOLOMON: Okay, thank you very much. Well, let me ask you something. Besides the two of you out there, and this obviously happened while we were leaving the courtroom, right?

Mr. Misas: I believe it was like one of the last breaks yesterday afternoon.

JUDGE SOLOMON: So we were here until about 5:30, something like that. About what time did it occur?

THE WITNESS: Sometime between 4:00 and 4:30. I don't remember the exact time, Your Honor.

JUDGE SOLOMON: And was there a security officer standing near you?

THE WITNESS: Not outside.

JUDGE SOLOMON: Was there anybody else standing near you when this happened?

THE WITNESS: No, sir.

JUDGE SOLOMON: And how far from you was Mr. Newport when he made the gesture?

THE WITNESS: The distance of the hallway. I was sitting on the one side, and he was walking on the other.

JUDGE SOLOMON: Did he speak to you when he made the gesture?

THE WITNESS: Afterwards he said, I can't talk to you right now.

JUDGE SOLOMON: Did you speak to him?

THE WITNESS: I said, hello, James.

JUDGE SOLOMON: Before or after the gesture?

THE WITNESS: Before, sir.

JUDGE SOLOMON: Okay, I don't have any further questions. Any questions relating to my question?

MS. HOLMES: Nothing further for this witness, Your Honor.

MR. NEWPORT: Just one.

JUDGE SOLOMON: Go ahead.

CROSS EXAMINATION (continued)

BY MR. NEWPORT:

Q You were engaging in a communication with Mr. Newport, correct?

A Yes.

MR. NEWPORT: Thank you.

Tr 1195 – 1196.

America, ARB No. 03-055 (2003); citing to ***Link v. Wabash R. R. Co.***, 370 U.S. 626, 630-631 (1962); punishable by sanctions administered by the courts in which the litigation occurs." Id.; ***Chambers v. NASCO, Inc***.,501 U.S. 32, 46-47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (finding that federal courts enjoy inherent powers to sanction conduct and that "the inherent power extends to a full range of litigation abuses"); ***Aoude v. Mobil Oil Corp***., 892 F.2d 1115, 1119 (1st Cir. 1989)("courts retain the inherent power to do what is necessary and proper to conduct judicial business in a satisfactory manner***"), Reid v. Niagara Mohawk Power Corp***., ARB No. 00-082, ALJ No. 2000-ERA-23, slip op. at 7 (ARB Aug. 30, 2002), see also ***Touche Ross & Co. v. S.E.C.***, 609 F.2d 570 (2nd Cir. N.Y., 1979).

Also inherent is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." ***Somerson v. Mail Contractors of America***, ARB No. 02-057; ***Chambers,*** *supra****,*** 44- 45. Because of the very potency of this inherent power, adjudicators must exercise it with "restraint and discretion." Id. See also ***Goforth v. Owens***, 766 F.2d 1533, 1535 (11th Cir. 1985) (dismissal under F.R.C.P.41(b) for failure to prosecute is a sanction applicable only in extreme circumstances); ***Searock v. Stripling***, 736 F.2d 650, 653 (11th Cir. 1984) (dismissal under F.R.C.P. 37(b)(2) must, at a minimum, be based on the sanctioned party's "willfulness, bad faith, or fault in failing to comply with a discovery order"); ***Flury v. Daimler Chrysler Corp***., 427 F.3d 939 (11th Cir., 2005)(in a product liability setting, a motorist's failure to preserve the subject vehicle resulted in extreme prejudice to manufacturer, warranting the sanction of dismissal).

When assessing an appropriate sanction I must "carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct." ***Aoude*** at 1118. Although outright dismissal of a complaint is an especially severe sanction, it is within my discretion to invoke it under the proper circumstances and after due consideration. ***Somerson v. Mail Contractors of America,*** *supra****; Chambers v. NASCO, Inc.***, 501 U.S. at 44-45; ***Aoude*** at 1118.

Another option available to me is to certify the Complainant for a contempt proceeding before the United States District Court for the Southern District of Florida. 29 CFR § 18.29 (b).

However, I find that a threat of violence made to a crucial witness is an exemplary basis for the sanction of dismissal. "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." ***Barnes v. Dalton***, 158 F.3d 1212, 1214 (11th Cir.1998). Repeated use of abusive language and gestures toward opposing counsel or a witness are violations of my initial Order. Threats against a crucial witness are far more insidious than merely using this proceeding to abuse the process of law. Therefore, the conduct exceeds the ***Barnes*** standard.

I find that Mr. Newport violated my Order of March 1, 2006 by continuing to be abusive in speech and gesture *and also* threatened bodily harm to a witness. Under 29 CFR § 18.29 (b), to stand for contempt at the District Court, the Claimant would be required to return to Miami, and could be subject to further sanctions, beyond any that I may impose. Among those might be coercive contempt or further criminal prosecution.

The Complainant's Motion requesting an "Open Court Hearing" and request that it be held in Kansas City, Missouri is denied. The Complainant had an open court hearing.

I find that the far more appropriate sanction is dismissal of his complaint against Respondent. I find that this sanction is sufficient, although evocation of the contempt proceeding

could exact a greater penalty. Prolongation of this matter will add additional time, costs and delay. Judicial and administrative economy and the interests of justice are best served with this remedy.

All other outstanding issues and motions in this matter are now moot.

RECOMMENDED ORDER

After having been fully advised in these premises, Respondent's Motion to Dismiss is **GRANTED**. The claim is **DISMISSED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

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

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

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