In the Matter of:

JAMES F. NEWPORT,

COMPLAINANT,

v.

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

ARB CASE NO. 06-110

ALJ CASE NO. 2005-ERA-024

DATE: February 29, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
James F. Newport, *pro se*, Blue Springs, Missouri

For the Respondent:
Mitchell S. Ross, Esq., Julie S. Holmes, Esq., *Florida Power & Light Company*, Juno Beach, Florida

FINAL DECISION AND ORDER

James F. Newport filed a complaint alleging that his former employer, Florida Power & Light Company (FPL), violated the employee protection provisions of the Energy Reorganization Act (ERA or Act). The ERA protects employees who engage in certain protected activities from employer retaliation.[1] A U.S. Department of Labor

[1] 42 U.S.C.A. § 5851(a) (West 2007). The ERA has been amended since Newport filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide here whether the amendments would apply to this case, which was filed before their effective date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision. The ERA's implementing regulations, found at 29 C.F.R. Part 24, have also been amended. 72 Fed. Reg.

Administrative Law Judge (ALJ) recommended that Newport's complaint be dismissed. Newport appealed. We affirm.

BACKGROUND

On February 28, 2006, FPL requested that the ALJ conduct a telephone conference and hear its request for sanctions. The basis for this request was Newport's belligerent, obscene, threatening, and profane language toward FPL and its attorneys in his pleadings, deposition, and other communications. During the March 1 telephone conference, the ALJ learned that Newport had threatened witnesses and counsel. He ordered Newport, who was pro se, not to threaten anyone again, and Newport agreed to refrain from doing so.[2]

The evidentiary hearing took place on March 21-24, 2006. According to the ALJ, on March 23 he was informed by counsel that during a recess earlier that day, Newport encountered Manny Misas, an FPL employee and witness at the hearing, in a hallway of the courthouse. The ALJ was told that Newport gestured toward Misas by drawing his finger across his own throat as if slashing Misas's throat.[3] On March 24 both Newport and Misas testified about the incident. Newport admitted that he made the gesture, and Misas testified that he considered the gesture to constitute a threat.[4]

On April 19, 2006, FPL filed a Renewed Motion for Sanctions. It requested dismissal of Newport's complaint because his gesture was "in blatant violation of [the] Court's unequivocal order on March 1, 2006 to act civil toward, and not to threaten, witnesses in this matter."[5] Newport responded by contending that his gesture had been misinterpreted.[6]

44,956 (Aug. 10, 2007). As explained more fully at note 10, *infra*, even if the amended regulations were applicable to this case, they would not change the outcome.

[2] Transcript of March 1, 2006 Telephone Conference at 1-13, 22, 30.

[3] May 23, 2006 Recommended Decision and Order (R. D. & O.) at 3-4. At page 20, note 4 of its brief, FPL informs us that it did not advise the ALJ about this incident. Instead, it asserts that the ALJ became aware of the incident during its cross examination of Newport on March 24.

[4] Hearing Transcript (Tr.) 924-927, 1181.

[5] Renewed Motion for Sanctions at 3.

[6] *See* Complainant's Motion for Open Court Hearing on Respondent's Renewed Motion for Sanctions at 1-5.

The ALJ issued his R. D. & O. on May 23, 2006, granting FPL's renewed motion and dismissing Newport's complaint. The ALJ found that the gesture constituted a threat and a violation of his March 1 order not to make threats. He concluded that dismissing Newport's complaint was an appropriate sanction.[7] Newport petitioned this Board to review the ALJ's decision.[8]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provision and to issue the final agency decision.[9] Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews the

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[7] R. D. & O. at 5-8.

[8] Newport submitted additional evidence to the Board that he had not submitted to the ALJ. In an August 18, 2006 order, we directed Newport to file a motion showing that this evidence was new and material and not available before the ALJ closed the record. Newport did not file such a motion. Therefore, we decided not to consider the proffered evidence. October 20, 2006 Order at 4. Nevertheless, on March 1, 2007, Newport submitted to the Board a "Renewed Motion to Reopen and Enlarge the Record." Given our October 20 ruling, we deny this motion and, in effect, grant that portion of FPL's January 3, 2007 Motion requesting that we strike any extra-record evidence. We grant that portion of the Motion to Strike pertaining to any "disparaging, inappropriate, and scandalous statements."

[9] *See* 29 C.F.R. § 24.8 (2005). *See also* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

ALJ's recommended decision de novo.[10] It is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature.[11]

DISCUSSION

The record supports the ALJ's finding that Newport's threatening gesture on March 23 violated the March 1 order to refrain from engaging in threatening behavior. The ALJ found that the gesture constituted "an exemplary basis for the sanction of dismissal."[12]

Department of Labor ALJs have an inherent power, governed not by rule or statute, but by the control necessarily vested in courts, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. ALJs must exercise this power discreetly, thereby fashioning an appropriate sanction for conduct which abuses the judicial process. Therefore, since dismissal is perhaps the severest sanction and because it sounds "'the death knell of the lawsuit,' [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious."[13]

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[10] *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-002, 97 CAA-009, slip op. at 15 (ARB Feb. 29, 2000). The ERA's amended regulations provide for substantial evidence review of the ALJ's factual findings. 29 C.F.R. § 24.110(b) (2007). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). As indicated above, even if the Board applied a substantial evidence review to the ALJ's findings in this case, such review would not change the outcome of our decision, because applying the less restrictive de novo review standard, we agree with the ALJ's finding that Newport's gesture was threatening.

[11] See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. U.S. Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

[12] R. D. & O. at 7.

[13] *Somerson v. Mail Contractors of Am.*, ARB No. 02-057, ALJ Nos. 2002-STA-018, 2002-STA-019, slip op. at 8-9 (ARB Nov. 25, 2003) (citations omitted).

Newport's conduct here was egregious. Moreover, the ALJ had warned him not to make threats. Therefore, the ALJ did not abuse his discretion in choosing the ultimate sanction of dismissal.

In his brief before the Board, Newport presents various arguments contending that the ALJ erred, e.g., that he was denied due process, prejudiced by the unethical conduct of opposing counsel, and denied his right to free speech. We reject all of Newport's arguments because either they do not contend, or they do not convince us, that the ALJ erred in finding that he threatened Misas or that the ALJ abused his discretion in dismissing the complaint.

Accordingly, we accept the ALJ's recommendation and **DISMISS** Newport's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge