



In the Matter of:

**MICHAEL L. ROSS**

**ARB CASE NO. 98-044**

**COMPLAINANT,**

**ALJ CASE NO. 96-ERA-36**

**v.**

**DATE: March 31, 1999**

**FLORIDA POWER & LIGHT COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

***Appearances:***

For the Complainant:

Frank J. McKeown, Jr., Esq., *West Palm Beach, Florida*

For the Respondent:

James S. Bramnick, Esq., Carmen S. Johnson, Esq., *Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., Miami, Florida*

**FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994). Complainant Michael L. Ross (Ross) alleged that Respondent Florida Power & Light Company (FP&L) harassed and terminated him in retaliation for refusing to falsify calibration data sheets in the Spring of 1994, and for reporting FP&L's improper calibration techniques to the Nuclear Regulatory Commission (NRC) in March 1995. On December 3, 1997, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) concluding that Ross did not file his complaint with the Department of Labor's Wage and Hour Division (Wage and Hour) within the 180 day statutory time period under the ERA. The ALJ also held that FP&L proved that it had a legitimate, nondiscriminatory reason for terminating Ross.

Because we conclude that Ross' complaint was timely filed, we reach the merits of the case. After a thorough review of the record we conclude that Ross failed to prove that his suspension and

subsequent termination were in retaliation for activity protected by the ERA's employee protection provision. Therefore, we dismiss the case.

## BACKGROUND

In 1989 Ross was hired to occupy an entry-level position in FP&L's Port Everglades Plant. In 1990 he moved to an Associate Nuclear Plant Operator position at FP&L's Turkey Point Nuclear Plant. In 1992 he was awarded a position as an Instrument and Control (I & C) Specialist. Transcript (TR) 51-68. The I & C Specialist position was security-sensitive.

Ross alleged that in the Spring of 1994 he was instructed to falsify pressure gauge calibration readings. TR 87, 220-221; R. D. and O. at 5. He also claimed that in 1994 and the Spring of 1995 he made complaints to Tom Johnson, Senior Resident Inspector for the Nuclear Regulatory Commission (NRC), stationed at the Turkey Point facility. During this same period, Ross was involved in several incidents which led his supervisors to conclude that Ross should be suspended with pay while he underwent a psychological evaluation.<sup>1/</sup> R. D. and O. at 11-12, 13-15; TR 655-656.

Ross was first informed of his suspension during a September 16, 1995 meeting with FP&L management. At that meeting Ross was told to contact FP&L's Employee Assistance Program in order to undergo a psychological evaluation. Ross specifically was informed that his cooperation in the evaluation process was essential if he was to be allowed to return to work.

Dr. Dennis Johnson, the clinical psychologist who subsequently conducted the evaluation of Ross, concluded that, "Mr. Ross is not judged as psychologically suitable for unescorted access authorization at the current time." RX 20 at 5. Dr. Johnson recommended that Ross undergo psychological and psychiatric treatment.

On November 3, 1995, Ross again met with FP&L management and was given a memorandum which stated:

This memo is to confirm our conversation today and the actions discussed at this meeting. We have reviewed information regarding your fitness for duty at a nuclear facility and have determined that your access to the facility has been suspended.

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<sup>1/</sup> As the ALJ found:

The record clearly demonstrates . . . the unusual, erratic and bizarre behavior exhibited by Complainant throughout his employment with FPL. Not only did he assault a co-worker in FPL's parking lot, but he also made comments to co-workers and supervisors about killing people and bringing an Uzi to work. These comments were reasonably interpreted as threatening the safety and well-being of persons employed at FPL.

R. D. and O. at 32.

Consequently, I have no choice but to give you 45 days from the date of this letter to find a job within the company that you can perform. You must have the required qualifications and, if necessary, seniority. If you have not found a position within 45 days, you will be discharged from the Company. Human Resources and I are available to assist you in any way possible.

Complainant's Exhibit (CX) 3. Ross was also told that he should seek psychological treatment, and that, after obtaining treatment he could, within the 45 days, seek conditional unescorted access to the facility. R. D. and O. at 20. However, FP&L managers told Ross that they believed his problems to be deeply rooted, and that he should not expect to obtain access in a short time. *Id.*

On December 29, 1995, Ross received a letter terminating his employment, which stated:

On November 3, 1995, you were given 45 days to find another job within the company or clear your access requirement through the Medical Review Officer.

We have provided job posting[s] from the Internal Placement System to you on a regular basis. In addition, we have maintained telephone contact in order to monitor your condition, to see if changes occurred that would permit your return to work.

Since there has been no significant change in your status, your employment with Florida Power and Light Company is terminated at the close of business on December 29, 1995.

Respondent's Exhibit (RX) 32.

Ross filed his complaint with Wage and Hour on June 21, 1996.

## DISCUSSION

We disagree with the ALJ's conclusion that the statute of limitations began to run when Ross' access privileges were suspended on November 3, 1995. However, because we conclude that Ross was not retaliated against for engaging in activity protected by the ERA's employee protection provision, we dismiss the complaint. We discuss these issues in turn.

### **I. Timeliness of Ross' Complaint.**

The employee protection provision of the ERA, as amended, contains a 180 day statutory time limit for the filing of complaints. 42 U.S.C. §5851(b) (1994). It is undisputed that Ross filed his ERA complaint with Wage and Hour more than 180 days after he received the November 3, 1995 letter but less than 180 days after he received the December 29, 1995 letter. Therefore, the timeliness of Ross' complaint is dependent upon whether the limitations period is measured from November 3 or December 29. Because we conclude that Ross was not given sufficient notice of the adverse action being taken against him to start the running of the limitations period until the December 29, 1996 letter, we hold that Ross' complaint was timely filed.

The Secretary of Labor has articulated the standard by which to determine if an ERA complaint has been timely filed. In *McGough v. U.S. Navy*, Case Nos. 86-ERA-18, 19, and 20, Sec. Dec. June 30, 1988, the Secretary held that the ERA statute of limitations begins to run “on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person [similarly situated to Complainant] with a reasonably prudent regard for his rights . . . .” *McGough* slip op. at 9-10 (citing numerous cases). See also *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991). The Under Secretary has also held that the ERA’s statute of limitations begins to run when the employee receives notice of the challenged employment decision, rather than the time that the effects of that decision are ultimately felt. *English v. General Electric*, Case No. 85-ERA-2, Under Sec. Final Dec. and Ord., Jan. 13, 1987, slip op. at 6, *aff’d sub nom. English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). Relying heavily on *English*, the ALJ ruled that on November 3 Ross received final and unequivocal notice that adverse action was being taken against him:

Considering the foregoing, particularly the acknowledgment and understanding by Ross of the conditions of the termination notice discussed at the November 3, 1995 meeting, I conclude that the November 3, 1995 letter, is final, definitive and unequivocal. The letter is decisive and conclusive, leaving no further chance for action, discussion, or change. There is no intimation in the notice that the employment decision was subject to appeal, review or revocation. The notice is unequivocal in that it is not ambiguous, i.e., free of misleading possibilities. Complainant was aware that if he did not regain his access to the nuclear plant or find another position with FPL within the 45-day limit, he would be terminated.

R. D. and O. at 27.

We do not consider *English* controlling in this case. In *English* General Electric notified English that she had been removed permanently from the laboratory where she worked and permanently barred from working in controlled areas of the facility. She was given 90 days within which to search for and bid on another position outside the controlled areas of the facility. When she had not found such a job, she was terminated.

English filed her complaint under the ERA within 30 days of the last day she worked for General Electric, but more than 30 days after the notification of her permanent removal from the controlled areas of the facility.<sup>2/</sup> The Under Secretary ruled that English’s complaint was not timely filed, citing Supreme Court decisions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. §1983.<sup>3/</sup> *English v. General Electric*, slip op. at 8-9.

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<sup>2/</sup> Prior to its amendment in 1992, the statute of limitations for employee whistleblower complaints under the ERA was 30 days. 42 U.S.C. §5851(b)(1) (1988)

<sup>3/</sup> *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Chardon v. Fernandez*, 454 U.S. 6 (1981).

Although there is a superficial similarity between this case and *English*, we believe that there is one decisive difference. In the first notice English received, she was *permanently barred* from the laboratory in which she worked and from other secure areas of the facility. Although English was told she had 90 days within which to seek a position in the unsecured areas of the facility, there was no ambiguity about the fact that she had permanently lost her position.

In the instant case, on the other hand, on November 3, 1995, Ross was informed that his access was *suspended* for 45 days. He was told explicitly that there were two methods by which he could retain his employment with FP&L: (1) he could seek psychological treatment and attempt to clear his access to secured areas; or (2) he could find another position in the unsecured areas of the FP&L facility. Thus, on November 3 Ross knew that his final removal from FP&L was conditioned on his failure to clear his access to the secured area, and thus regain his job, and to find another position at FP&L for which he was qualified. Until Ross was given the December 29, 1995 notice, it was reasonable for Ross to think that it was still possible for him to regain his access to the secured area, and thus his position.

For these reasons, the information that Ross was given on November 3 (including what he was told by FP&L managers) did not constitute final and unequivocal notice that he was being terminated. *See English v. Whitfield*, 858 F.2d at 961. It was not until December 29, 1995, that “facts which would support the discrimination complaint were apparent or should have been apparent to a person [similarly situated to Complainant] with a reasonably prudent regard for his rights . . .” *McGough v. U.S. Navy*, slip op. at 9-10. Therefore, Ross’ complaint was timely filed.

## II. The Merits.

The employee protection provision of the ERA provides in pertinent part:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 . . . ;

\* \* \*

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 . . . ;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954;

\* \* \*

(F) assisted or participated or is about to assist or participate in any manner in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended . . . .

42 U.S.C. §5851 (1994). In order to establish a violation of this provision Ross was required to prove by a preponderance of the evidence that: (1) he engaged in activity protected by the ERA; (2) FP&L officials were aware of that protected activity; and (3) FP&L retaliated against him because of his protected activity. See *Dysert v. Sec’y of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995). Because Ross failed to prove any of these elements, we conclude that he was not terminated in violation of the ERA.

First, Ross failed to prove that he ever engaged in activity protected by the ERA.<sup>4/</sup> Ross asserted that he engaged in protected activity three times. First, he testified that while he was working in the Calibration Lab in 1994 he complained to his supervisor and colleagues<sup>5/</sup> about the methods used in reporting the calibration of certain pressure gauges. R. D. and O. at 5. Ross also testified that on two occasions – once in 1994 and again in 1995 – he complained about the calibration methods to Tom Johnson, the NRC’s Senior Resident Inspector at the Turkey Point facility. R. D. and O. at 6-7.

All of the named employees testified that Ross never complained to them about the calibration methods used in the Lab. R. D. and O. at 5. Furthermore, NRC Resident Inspector Johnson reported that, although Ross had talked to him on several occasions during his employment at FP&L, Ross had never made any safety related allegations:

Johnson reported that, although Ross had spoken to him on several occasions in early 1995, Ross never alleged any falsification issues or safety concerns and specifically never mentioned any issue related to the falsification of calibration

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<sup>4/</sup> We evaluate the evidence in the record in light of the ALJ’s credibility determination:

Generally, of the two primary witnesses in this matter, Complainant was not an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand. His testimony can generally be characterized by inconsistencies, retractions and contradictions. He appeared confused and equivocal during portions of his testimony, particularly related to his suspension of access and the evaluation by Dr. Johnson. He presented testimony in a muddled, unfocused manner and lacked direction, often straying from the question at hand to other unrelated events. On the other hand, Steve Franzone’s [Ross’ supervisor] testimony was straight-forward, detailed and presented in a sincere, consistent manner.

R. D. and O. at 25.

<sup>5/</sup> Ross testified that he questioned the calibration methods in front of “everyone” in the Lab (TR 85-86, 221-222), and complained to Lab Supervisor John Halvorsen, and employees Harold Blehm, Larry Slone, and Claude Arashiro. R. D. and O. at 5.

records of pressure instruments. Instead, Ross had questions and comments about “training and qualification related to the measuring and test equipment process and about fitness for duty policies and work environment.” . . . Johnson further reported that Ross did not make any allegations about the falsification of calibration records to the NRC until March 4, 1996, well after his discharge.

R. D. and O at 8.<sup>6/</sup> Ross did complain to Johnson about calibration records *after* he was terminated by FP&L. R. D. and O. at 8. However, that complaint could not have caused FP&L to terminate Ross.

Based upon the overwhelming evidence in the record which contradicts Ross’ allegation that he made safety-related complaints about the calibration methods used in the Lab, we conclude that Ross did not prove the first element of an ERA violation -- that he engaged in activity protected by the ERA employee protection provision.

Because Ross did not engage in protected activity, there is no factual basis upon which to conclude that FP&L *knew* of Ross’ protected activity. Therefore, Ross has also failed to prove the second element of an ERA violation.

Third, there is overwhelming evidence in the record that FP&L suspended and then terminated Ross not because of any protected activity, but solely because of his troubling behavior, and the results of the psychological evaluation which was conducted because of his behavior. Wholly apart from any alleged protected activity, Ross engaged in “unusual, erratic and bizarre behavior” which led FP&L officials to question his psychological fitness to work in a secured area of a nuclear facility. R. D. and O. at 32. For example, in July 1994 Ross had a conversation with plant supervisor Tom Wogan in which Ross made a veiled threat about killing people. TR 249-251, 603. Wogan reported the comments to John Franzone, Ross’ supervisor.

Also in 1994, Ross had a confrontation with a fellow employee in FP&L’s parking lot: Ross testified that [Norm] Jacques cut him off in the parking lot, looked at him and laughed, after which Ross parked his vehicle and approached Jacques. He admitted placing his hand near or on Jacques’ neck area and putting a “choke hold” on Jacques. . . . [A fellow car pool member who witnessed the incident] testified that Ross lunged at Jacques, picking him up from underneath the neck and stated “don’t ever do that to me again.”

R. D. and O. at 11.<sup>7/</sup>

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<sup>6/</sup> Although NRC Resident Inspector Johnson did not testify at the hearing, the NRC report on Ross’ claims of retaliation was admitted in the record. RX48. The NRC report concluded that prior to his discharge Ross never raised safety complaints with Johnson. *Id.* at 11.

<sup>7/</sup> After either the Wogan incident or the parking lot incident, FP&L management recommended that Ross speak to a psychologist in the company’s Employee Assistance Program. (continued...)

However, the incident that immediately preceded the September 16, 1995 meeting at which Ross was suspended evolved out of Ross' complaints about a cartoon that one of his fellow employees had drawn. Ross thought the cartoon was derogatory.<sup>8/</sup> Joe Myszkiewicz, one of Ross' fellow employees, had heard a rumor that Ross had complained to management about the cartoon and asked him about it. In response, Ross remarked "the innocent [always] get the blame" and "all this stuff makes you want to bring in an uzi." TR 902, 904, 906.

In light of this comment, Myszkiewicz became concerned about the safety of the I&C Specialists. He reported Ross' comment to several FP&L management personnel. R. D. and O. at 15. Several of Ross' co-workers then complained to Franzone that they did not want to work with Ross. Franzone decided to suspend Complainant's access and have him evaluated by the Employee Assistance Program. R. D. and O. at 13-17.

Ross was first informed of his suspension during a September 16, 1995 meeting with FP&L management. At that meeting he also was told to contact FP&L's Employee Assistance Program and to undergo a psychological evaluation. Ross specifically was informed that his cooperation in the evaluation process was essential if he was to be allowed to return to work.

The EAP referred Ross to Dr. Dennis L. Johnson, who evaluated Ross and also referred him to Dr. Salo Shapiro, a psychiatrist. Dr. Shapiro reported that Ross was suffering from a "major mental illness, manifesting clear paranoid compensation as well as a thought process defect." R. D. and O. at 18. Dr. Johnson subsequently sent his report on Ross to FP&L. Dr. Johnson concluded that Ross was not psychologically fit for unescorted access authorization. He also recommended that Ross receive professional psychological and psychiatric treatment. R. D. and O. at 18-19.

Following receipt of Johnson's report, FP&L asked Ross to attend a second meeting with FP&L managers on November 3. At that meeting Ross was given the letter suspending him, and giving him 45 days in which to find a job with the company outside of the secured area. Complainant's Exhibit (CX) 3. Ross also was told that he could seek psychological treatment and attempt to have his suspension lifted within the 45 day period. Thus, the ALJ found:

[FP&L manager] Marshall testified that Art Cummings, Fitness for Duty Supervisor, explained to Ross that he needed to seek psychological treatment and after 45 days he could attempt to obtain conditional unescorted access if he was under continuing treatment . . . Cummings informed Ross that his psychological problems were "deeply rooted" and he should not expect to re-obtain access in a

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<sup>7/</sup>(...continued)  
R. D. and O. at 11; TR 114, 508-509, 604.

<sup>8/</sup> Ross is Jewish. In the cartoon Ross was depicted with a circle on the back of his head. Ross thought the circle represented a yarmulke. The artist testified that he did not know Ross' religion, and that the circle depicted the bald spot on the back of Ross' head. R. D. and O. at 13. In any event "Ross could not explain how the cartoon had anything to do with any nuclear safety concerns or retaliation for raising such concerns." *Id.*

short time . . . . Marshall further testified that it was clear from the meeting that Ross would be responsible for obtaining another job outside the access area within 45 days or be cleared for access to the plant or be discharged . . . .

R. D. and O. at 20 (citations omitted).

Between November 3, and December 29, 1995, Ross did not find another position within the facility. R. D. and O. at 21-22. Although he sought psychiatric treatment, he did not present to FP&L any evidence that would support a psychological clearance to work in the secured area. *Id.* at 21. On December 29, 1995 Ross received a letter terminating his employment. RX 32.

We find there is conclusive evidence that Ross was suspended for a legitimate, non-discriminatory reason, and that he was terminated because he failed either to find another position at the plant or to clear the bar placed on his access to the secured area of the facility.

For the foregoing reasons, we conclude that while Ross' ERA complaint was timely filed, he failed to prove that he was retaliated against for engaging in activity protected by the ERA. The complaint is **DISMISSED**.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member