In the Matter of:

THOMAS SAPORITO,

COMPLAINANT,

v.

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

ARB CASE NO. 09-009
09-010

ALJ CASE NO. 2008-ERA-014

DATE: February 28, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Thomas Saporito, pro se, Jupiter, Florida.

***For the Respondent*:**
Mitchell S. Ross, *Florida Power & Light Co.*, Juno Beach, Florida.

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

Thomas Saporito filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on July 4, 2008. He alleged that his employer, Florida Power & Light (FPL) violated the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA), when it refused to hire him on various occasions in 2008. Pursuant to a Decision and Order dated October 2, 2008 (D. & O.), a Department of Labor (DOL) Administrative Law Judge (ALJ) granted FPL's motion to dismiss and dismissed Saporito's complaint because it was untimely. The ALJ denied FPL's motion for sanctions and Saporito's motion for default

judgment. The ALJ also dismissed Saporito's Amended Complaint. Saporito appealed the ALJ's dismissal of his complaint (ARB No. 09-009), and FPL appealed the denial of its motion for sanctions (ARB No. 09-010). We summarily affirm the ALJ's decisions.

Saporito's Appeal (ARB No. 09-009)

In summarily affirming the ALJ's dismissal of Saporito's complaint, we limit our comments to the most critical points. First, the granting of a motion to dismiss is a legal conclusion that we review de novo. *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 3 (ARB Mar. 13, 2001)(dismissal on the pleadings is a decision as a matter of law). Such motions should be granted cautiously. Saporito admits the most critical facts in issue and some facts are a matter of public record. It is a matter of public record that FPL fired Saporito for cause in 1988. *See Saporito v. Florida Power & Light*, ARB No. 98-008, ALJ Nos. 1989-ERA-007, -017 (ARB Aug. 11, 1998). He admits that he applied for a job with FPL on August 8, 2005, and received a letter on December 2, 2005, which informed him that he was "not eligible for rehire" because he was terminated "for cause." Complainant's Brief at 9. As the ALJ explained, Saporito received a clear notice in 2005 that he was ineligible to be rehired by FPL. His complaint filed July 2008 for alleged retaliatory refusals to hire is untimely on its face.[1] Saporito attempts to salvage his claim by arguing equitable tolling because FPL allegedly lulled him to sit on his rights.[2] We are not persuaded. Having been fired for cause in 1988, explicitly told in 2005 that he was not eligible for rehire and having never received a job offer from FPL since that time, it is unreasonable as a matter of law for Saporito to claim that he was tricked until 2008 into believing that FPL would hired him.

FPL's Motion for Sanctions (ARB No. 09-010) and Saporito's Other Motions

The ALJ's decision to deny FPL's motion for sanctions and the denial of Saporito's motion for default judgment are matters committed to the ALJ's discretion. *Malpass v. General Electric, Co.*, 1985-ERA-038, -039 (Sec'y Mar. 1, 1994)(sanctions are reviewed under abuse of discretion standard). FPL's motion for sanctions was not limited to a monetary sanction. FPL sought a remedy against Saporito's continued re-litigation of his termination from employment in 1988. The ALJ provided little rationale for his denial of any type of sanction. It is unclear whether the ALJ misunderstood FPL's request for sanctions or whether he believed he had no authority to issue any sanction. We believe that ALJs in ERA whistleblower cases have some inherent authority to control the cases before them. *See Blodgett v. Tennessee Dep't of Env't and Conservation*, ARB No. 03-138, ALJ No. 2003-CAA-015 (ARB Mar. 22, 2004)(recognizing inherent authority in administrative adjudications); *Secretary of Labor v. Daanen & Janssen, Inc.*, 19 F.M.S.H.R.C. 665 (1997)(same). We are concerned with Saporito's re-litigation of his unsuccessful 1988 retaliation claim, but we do not believe that this is the proper case in which to

[1] Complaints for illegal retaliation under the ERA statutes must be filed within 180 days of the violation. 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.3 .

[2] *See, e.g., Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 7-8 (ARB Mar. 31, 2010) (equitable estoppel has been recognized where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights).

address that issue. We note that several appeals are still pending before us involving litigation between FPL and Saporito and, therefore, we affirm the ALJ's denial of sanctions in this case, but may revisit the issue of sanctions if it is appropriately before us in the remaining appeals. Finally, we find that the ALJ justifiably rejected Saporito's amended complaint, which was filed without leave of the ALJ and was based on an entirely new claim not investigated by OSHA. *See Jay v. Alcon Labs., Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002 (ARB Apr. 10, 2009)(denial of motion to amend complaint reviewed under abuse of discretion standard).

CONCLUSION

Accordingly, we affirm the ALJ's Decision and Order on all issues, and we **DENY** Saporito's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Chief Deputy Administrative Appeals Judge