



In the Matter of:

MARK E. HOWICK,

ARB CASE NO. 03-156

COMPLAINANT,

ALJ CASE NO. 03-STA-06

v.

CAMPBELL-EWALD COMPANY,

RESPONDENT,

and

MARK E. HOWICK,

ARB CASE NO. 04-065

COMPLAINANT,

ALJ CASE NO. 04-STA-07

v.

DATE: November 30, 2004

**CAMPBELL-EWALD COMPANY,
FRED W. BATTEN, ESQ., and
CLARK HILL PLC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq.,¹ St. Augustine, Florida

For the Respondents:

Fred W. Batten, Esq., Clark Hill PLC, Detroit, Michigan

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

This case arose originally from a complaint Mark E. Howick filed alleging that his employer, Campbell-Ewald Company, violated the employee protection or whistleblower provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), when it terminated his employment. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint (*Howick I*) pursuant to 29 C.F.R. § 18.6(d)(2)(v) (2002) because of Howick's failure to prosecute the case in compliance with the ALJ's pre-hearing orders.² The ALJ's findings are supported by a review of the record and comply with the applicable law. Thus, as we discuss below, the ALJ acted within his discretion in dismissing the complaint.

Howick subsequently filed a complaint alleging that Campbell-Ewald's counsel violated the employee protection or whistleblower provisions of the STAA and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), as well as the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2004), when Campbell-Ewald filed a motion for a "gag order" with the ALJ assigned to hear his original complaint, during the pendency of that matter. Another Department of

¹ Pursuant to an October 20, 2004 Final Order Suspending Attorney from Practice before the Administrative Review Board, the Board imposed reciprocal discipline on Mr. Slavin based on his August 27, 2004 suspension by the jurisdiction in which he is licensed to practice law, the Supreme Court of Tennessee. The October 20 order suspended Mr. Slavin from practicing before this Board for the same period as specified by the Tennessee court order, which affords Mr. Slavin the opportunity to apply for reinstatement after one year from the date of that order. *In the matter of the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172, slip op. at 1 (ARB Oct. 20, 2004). Since Mr. Slavin's filings in these cases pre-date the Board's October 20 suspension order, the Board accepts Mr. Slavin's filings on behalf of the complainant in these cases, Mark E. Howick, as the attorney for Howick and decide the cases on their merits.

² The ALJ subsequently issued an order denying Howick's request for reconsideration as untimely and as the ALJ found no reason to grant reconsideration.

Labor ALJ issued a Recommended Order (R. O.) dismissing this complaint (*Howick II*) pursuant to 29 C.F.R. § 18.40(d) (2004), on the basis that Howick failed to plead or show any element necessary to present a claim under the relevant whistleblower provisions.³ Because the ALJ's determination is supported by a review of the record and is in accord with the relevant whistleblower provisions, the ALJ properly dismissed Howick's second claim, as we also discuss below.

BACKGROUND

Campbell-Ewald was contracted to run the Olympic Torch Relay promotional tour, which traveled across the United States as part of a promotion preceding the 2002 Winter Olympic Games in Salt Lake City, Utah. Campbell-Ewald hired Howick as a truck driver for the tour. Howick's employment was temporary and started on November 12, 2001, and was to end on February 12, 2002. Respondent's Exhibit 6. Campbell-Ewald fired Howick, however, on or about January 13, 2002.

On January 15, 2002, Howick filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Campbell-Ewald violated the employee protection or whistleblower provisions of the STAA when it fired him. Specifically, Howick alleged in his complaint that he was fired because he had raised safety hazard issues with Campbell-Ewald management regarding the transportation and use of propane tanks on the tour and had complained to Campbell-Ewald management that drivers on the tour were required to drive without rest in excess of the number of hours permitted under the Department of Transportation hours of service regulations. After an investigation, OSHA dismissed Howick's complaint as non meritorious and Howick requested a hearing before the Office of Administrative Judges.

At a hearing on September 9, 2003, the ALJ dismissed the complaint. Hearing Transcript at 55. Subsequently the ALJ issued a R. D. & O. on September 18, 2003, formalizing his dismissal of the complaint (*Howick I*). The ALJ dismissed the complaint pursuant to 29 C.F.R. § 18.6(d)(2)(v) because of Howick's failure to prosecute the case in accordance with the ALJ's pre-hearing orders.

In conjunction with the litigation of Howick's original complaint, Howick's counsel, Mr. Slavin, had submitted a request for subpoenas and other motions to the ALJ on September 17, 2003. In this September 17 submission, Howick indicated that his counsel had visited Chief Administrative Law Judge Daniel J. Roketenetz regarding his original complaint pending before the ALJ and that Judge Roketenetz suggested that

³ The ALJ also later issued an order denying Howick's request for reconsideration of the denial of his second complaint.

Howick file a motion for reconsideration of the dismissal of his original complaint.⁴ In light of this, Campbell-Ewald filed a motion on September 19, 2003, objecting to Howick and his counsel's ex parte communications and requesting a "gag order" during the pendency of his original complaint before the ALJ.

Howick responded by filing a complaint with OSHA on September 19, 2003, (*Howick II*), contending that Campbell-Ewald's motion for a "gag order" constituted an adverse action pursuant to, and per se violation of, the whistleblower provisions under the STAA and TSCA. On September 24, 2003, Campbell-Ewald withdrew the motion for a "gag order" that was the subject of Howick's second complaint.

After an investigation, OSHA dismissed Howick's second complaint because Campbell-Ewald had withdrawn the motion for a "gag order" that was the subject of Howick's second complaint and because an appeal of the denial of Howick's original complaint was pending before the Board. Howick requested a hearing before the Office of Administrative Judges on his second complaint.

In *Howick II*, the ALJ issued an Order to Show Cause why the complaint should not be dismissed for failure to state a claim upon which relief can be granted or why a summary decision denying the complaint should not be issued. Howick responded with a Motion to Remand, urging that the case be remanded to OSHA for a proper investigation of his complaint. Campbell-Ewald responded, urging that the complaint be dismissed.

The ALJ denied Howick's Motion to Remand, on the basis that he did not demonstrate that he had contacted Campbell-Ewald in an effort to resolve the matter, in accordance with the ALJ's instructions in his pre-hearing order. The ALJ also denied the motion since OSHA had denied the complaint because Howick could not develop a prima facie case in light of the fact that Campbell-Ewald withdrew the motion that was the subject of Howick's complaint. R. O. at 2-3. Ultimately the ALJ dismissed Howick's second complaint pursuant to 20 C.F.R. § 18.40(d) as Howick failed to show that he had suffered any adverse employment action under the STAA from the filing of Campbell-Ewald's motion. R. O. at 3.

ISSUES

1. Whether the ALJ abused his discretion in dismissing Howick's original complaint.
2. Whether Campbell-Ewald was entitled to summary decision on Howick's second complaint.

⁴ Howick did ultimately file a motion for reconsideration of the dismissal of his original complaint on October 16, 2003, which the ALJ denied in an order issued on October 21, 2003.

CONSOLIDATION OF ARB CASE NOS. 03-156 AND 04-065

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Howick's appeals of the dismissals of his two complaints (*Howick I & II*) are hereby consolidated for the purpose of review and decision. See *Agosto v. Consolidated Edison Co. of New York, Inc.*, ARB Nos. 98-007, 152, ALJ Nos. 96-ERA-2, 97-ERA-54 (ARB July 27, 1999); *Bonanno v. Stone & Webster Eng'g*, ARB Nos. 96-110, 165, ALJ Nos. 95-ERA-54, 96-ERA-7 (ARB Dec. 12, 1996).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978 (2004). Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). These complaints are before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).⁵ Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

⁵ This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

On reviewing a dismissal made in accordance with Rule 41(b) of the Federal Rules of Civil Procedure (giving courts the authority to dismiss a case for “failure of the plaintiff to prosecute or to comply with these rules or any order of [the] court”), we determine whether the ALJ abused his discretion in dismissing the case. Fed. R. Civ. P. 41(b); see *Dickson v. Butler Motor Transit/Coach USA*, ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003)(“ALJ acted well within his discretion in determining that dismissal was the appropriate sanction for failure to comply with the ALJ’s orders”); *Dickson v. Lakefront Lines, Inc.*, ARB No. 02-029, ALJ No. 01-STA-62, slip op. at 4 (July 24, 2003)(ALJ “was acting within his discretion to recommend dismissal”). See also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003); *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002); *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586, 589 (6th Cir. 2001); *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999); *Ehrehaus v. Reynolds*, 964 F.2d 916, 920 (10th Cir. 1992); *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980).⁶

Finally, in regard to Howick’s complaint under the TSCA (*Howick II*), the environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ’s initial decisions to the ARB. 29 C.F.R. § 24.8 (2004). See Secretary’s Order No. 1-2002, 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)).

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 ARB engages in de novo review of the ALJ’s recommended decision. See 5 U.S.C.A. § 557(b) (West 2002); 29 C.F.R. § 24.8; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

⁶ As the ALJ in *Howick I* observed, Howick resides in Ohio and Campbell-Ewald is located in Michigan, both of which fall within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, while Howick’s termination from his employment with Campbell-Ewald occurred in Kansas, which is located within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. R. D. & O. at 23.

DISCUSSION

Howick I

The ALJ's attempts in *Howick I* to obtain Howick's compliance with the ALJ's orders and Campbell-Ewald's discovery requests prior to and during the hearing are detailed at great length at pages 1-21 of the ALJ's R. D. & O. We adopt those findings of fact as supported by substantial evidence on the record considered as a whole. A review of the ALJ's R. D. & O. indicates that the ALJ properly considered the appropriate guidelines and factors in determining whether Howick's original complaint should be dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure. R. D. & O. at 23.

Rule 41(b) authorizes the courts to dismiss a case for "failure of the plaintiff to prosecute or to comply with these rules or any order of [the] court." Fed. R. Civ. P. 41(b); *Link*, 370 U.S. at 629 n.3. Like the courts, Department of Labor Administrative Law Judges must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." *Puckett v. Tennessee Valley Auth.*, ARB No. 03-024, ALJ No. 02-ERA-15, slip op. at 3 (ARB June 25, 2004); *Curley v. Grand Rapids Iron & Metal Co.*, ARB No.00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 2000). Thus, an ALJ may recommend dismissal of a complaint based upon a party's failure to comply with his order. 29 C.F.R. § 18.6(d)(2)(v); *see also* 29 C.F.R. § 1978.106(a) (providing for application of the procedural rules at 29 C.F.R. Part 18 in STAA hearings unless otherwise provided by the Part 1978 STAA regulations).⁷ Nevertheless, dismissal of a complaint for failure to comply with the ALJ's orders is a very severe penalty to be assessed in only the most extreme cases. *Accord* Fed. R. Civ. P.

⁷ 29 C.F.R. § 18.6(d)(2) provides:

If a party or an officer or agent of a party fails to comply with . . . an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(v) Rule that . . . a decision of the proceeding be rendered against the non-complying party

29 C.F.R. § 18.6(d)(2).

37(b)(2)(C); *Conkle*, 352 F.3d at 1337; *Ehrehaus*, 964 F.2d at 920; *Carter*, 636 F.2d at 161.

Both the Sixth and the Tenth Circuit Court of Appeals have identified a number of factors to be considered before dismissal of a case is warranted. These factors include: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a for failure to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions were considered. *Conkle*, 352 F.3d at 1337; *Gripe*, 312 F.3d at 1188; *Mulbah*, 261 F.3d at 589; *Knoll*, 176 F.3d at 363; *Ehrehaus*, 964 F.2d at 921.⁸ The courts further noted that the factors do not create a rigid test but are simply criteria for the court to consider. *Gripe*, 312 F.3d at 1188; *Knoll*, 176 F.3d at 363; *Ehrehaus*, 964 F.2d at 921.

In *Howick I*, the ALJ specifically found a record of “delay and malfeasance” by Howick and his counsel, Mr. Slavin, noting:

their causing delays of over eight months in scheduling Howick’s deposition, until four days before the hearing; causing delays of over four months in scheduling the hearing; causing delays of over six months in answering Campbell-Ewald’s discovery requests; Howick’s and his counsel’s failure to communicate with Campbell-Ewald that Howick could not appear for a scheduled deposition; Howick’s delay in completing his deposition; their violating of the ALJ’s orders, including the ALJ’s order to have trial exhibits marked, indexed and timely exchanged; their filing of frivolous motions; their requesting subpoenas after 4:00 pm on Friday September 4, 2003, before the September 9, 2003 hearing; and ultimately their failure to be prepared at the hearing with trial exhibits marked, indexed and exchanged.

R. D. & O. at 25-28. Thus, the ALJ found a record of interference with the judicial process due to the culpability or fault of Howick and his counsel, Mr. Slavin.

The ALJ further found that Howick’s and Slavin’s conduct prejudiced Campbell-Ewald, preventing Campbell-Ewald from developing evidence and mounting a meaningful defense. R. D. & O. at 26. Furthermore, the ALJ properly warned Howick and Slavin at the pre-hearing conference, in a pre-hearing order and, ultimately, at the

⁸ The Sixth Circuit does not specifically consider the amount of interference with the judicial process among the factors to be considered before dismissal of a case is warranted. See *Mulbah*, 261 F.3d at 589; *Knoll*, 176 F.3d at 363.

hearing that Howick was risking sanctions, up to and including dismissal. *See R. D. & O.* at 26-27. Howick's counsel is well aware of the consequences of risking sanctions, up to and including dismissal, for failing to comply with an ALJ's orders and a respondent's discovery requests. *See Puckett*, slip op. at 3; *Dickson*, ARB No. 02-098, slip op. at 4; *Dickson*, ARB No. 02-029, slip op. at 4.

Although the Sixth Circuit, for one, has expressed reluctance to uphold the sanction of dismissal where fault lies solely with the client's attorney, and not the client himself, *Mulbah*, 261 F.3d at 590; *Knoll*, 176 F.3d at 363; *Carter*, 636 F.2d at 161, the ALJ found this case distinguishable. The ALJ found a record of delay not only by Howick's counsel, Mr. Slavin, but an active role by Howick himself in preventing Campbell-Ewald from mounting a meaningful defense due to his reckless disregard for the effect of his own conduct. *R. D. & O.* at 27.

Finally, the ALJ also considered the efficacy of lesser sanctions. After considering the totality of the circumstances and the overall course of dilatory and contemptuous behavior of both Howick and his counsel in wasting the ALJ's time and resources, the ALJ did not believe that any alternative sanction other than dismissal was warranted in this case. *R. D. & O.* at 28-29.

After reviewing the *R. D. & O.*, the case record and the parties' briefs, we conclude that the record supports the ALJ's findings and the ALJ's recommendation to dismiss Howick's original complaint is based on the appropriate consideration and factors in compliance with the relevant, applicable law. Consequently, we conclude that, in these circumstances, the ALJ acted within his discretion in dismissing Howick's original complaint.

On appeal, Howick contends that the ALJ erred in failing to grant Howick summary judgment on the merits of his STAA complaint, failing to order default judgment and sanctions against the respondent for its own abuse of discovery, and asks the Board to reverse the ALJ's orders, except his pre-hearing order, and his *R. D. & O.* and remand the case to a new ALJ or to OSHA for a proper investigation of his complaint. Howick is attempting to reach the merits of his complaint on appeal, but has not responded to the issue before the Board, which is the sanction of dismissal. Because Howick's appeal to this Board does not explain his or his counsel's actions before the ALJ, however, we affirm the ALJ's *R. D. & O.* and dismiss the complaint.⁹

⁹ Because we adopt the ALJ's *R. D. & O.* and dismiss the complaint, we need not address Campbell-Ewald's motion for the Board to strike copies filed with the Board of evidence and motions that Howick filed with the ALJ after the issuance of his original *R. D. & O.* (including Howick's motion for reconsideration) or address Howick's response, that the ALJ erred in failing to grant his motion for reconsideration.

Howick II

The ALJ recommended that Howick's complaint be dismissed pursuant to 20 C.F.R. § 18.40(d), because the ALJ concluded that Howick failed to show that he had suffered any adverse employment action under the STAA from the filing of Campbell-Ewald's motion. R. & O. at 3. In other words, the ALJ found that Howick failed to allege the essential elements of a violation of the STAA's whistleblower protection provisions.

On appeal, Howick requests oral argument and summary reversal of the ALJ's order. Specifically, Howick contends that the ALJ had jurisdiction to consider the complaint, as Campbell-Ewald's motion for a "gag order" to the ALJ in *Howick I*, filed after the ALJ had decided that case, would have prevented Howick from engaging in protected activity if it were granted. Finally, Howick asserts that the ALJ showed possible bias in issuing his Order to Show Cause and erred in failing to remand the case to OSHA for a proper investigation of his complaint.¹⁰

To prevail on a complaint under the environmental whistleblower protection provisions, such as the TSCA, Howick must establish by a preponderance of the evidence that he engaged in protected activity of which Campbell-Ewald was aware, that he suffered *adverse employment action*, and that the protected activity was the reason for the adverse action. *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, -CAA-21, slip op. at 5 (ARB May 28, 2004); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003) (emphasis added). *See also Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 5 (ARB Apr. 30, 2004). Similarly, to prevail on a claim under the STAA, Howick must prove by a preponderance of the evidence that he engaged in protected activity, Campbell-Ewald was aware of the protected activity, Campbell-Ewald discharged him, or disciplined or *discriminated against him with respect to pay, terms, or privileges of employment*, and there is a causal connection between the protected activity and the adverse action. 49 U.S.C.A. § 31105(a) (West 1997) (emphasis added); *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Env't'l Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow*

¹⁰ On appeal, Howick also reiterates the contention that he made in a motion for reconsideration before the ALJ, that Campbell-Ewald's request that the case be dismissed in response to the ALJ's Order to Show Cause constituted a "motion" and, therefore, Campbell-Ewald also had failed to demonstrate that it had contacted Howick in an effort to resolve the matter in accordance with the ALJ's instructions in his pre-hearing order. The ALJ properly denied Howick's motion for reconsideration, however, because Campbell-Ewald's request that the complaint be dismissed was made in response to the ALJ's Order to Show Cause and was not an unexpected motion seeking or requesting anything in addition to answering the question raised by the ALJ in his order.

Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

The ALJ's summary judgment regulations provide in pertinent part:

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

20 C.F.R. § 18.40(d).

As indicated above, to prevail in this matter Howick would have to prove by a preponderance of the evidence that Campbell-Ewald's motion for a "gag order" constituted an adverse employment action or discipline or discrimination against him with respect to the pay, terms, or privileges of his employment. An adverse employment action does not encompass every decision that an employer makes that renders an employee unhappy. To be actionable, a decision must constitute a tangible employment action, for example a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Marshall v. Lockheed Martin Energy Sys., Inc.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at (ARB Sep. 29, 2004); *Jenkins*, slip op. at 19. Allegations, bare denials, or speculative theories do not create an issue of material fact that would entitle the non-moving party to an evidentiary hearing. *Seetharaman*, slip op. at 6.

After reviewing the record and the facts in the light most favorable to Howick, we agree with the ALJ that Howick has failed to demonstrate a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint, which is that the filing of the request for a protective order constituted an adverse employment action or discipline or discrimination against him with respect to the pay, terms, or privileges of his employment. *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 7 (ARB Oct. 14, 2003). Neither Howick's complaint or response to the ALJ's Order to Show Cause, nor his briefs to us on appeal, contending that Campbell-Ewald's motion for a "gag order" violated the whistleblower provisions under the STAA and TSCA, satisfy his burden on summary decision under 20 C.F.R. § 18.40(d) to show that he suffered any adverse "employment" action under those statutes from the filing of Campbell-Ewald's motion. At summary decision, Howick must produce affidavits or other admissible evidence that he suffered

“employment” discrimination because of his safety complaints. Having failed to do so, Campbell-Ewald is entitled, as the ALJ found, to summary decision.¹¹

CONCLUSION

The record supports the ALJ’s recommendation in *Howick I* to dismiss Howick’s original complaint. Howick’s appeal to this Board does not explain his or his counsel’s actions before the ALJ and the ALJ acted within his discretion in dismissing Howick’s original complaint, based on the appropriate consideration and factors in compliance with the relevant, applicable law. We therefore **AFFIRM** the ALJ’s R. D. & O. in *Howick I* and **DISMISS** Howick’s original complaint.

In *Howick II*, because Howick has not shown that he suffered any adverse employment action under the TSCA or STAA from the filing of Campbell-Ewald’s motion for a “gag order,” Campbell-Ewald is entitled to summary decision as a matter of law. Therefore, we **DISMISS** Howick’s complaint in *Howick II*.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹¹ Because neither Howick’s complaint nor his briefs on appeal satisfy his burden to show that he suffered any adverse “employment” action under either the STAA or the TSCA, any error by the ALJ in not addressing Howick’s second complaint under the TSCA was harmless. Moreover, as Campbell-Ewald is, therefore, entitled to summary decision, Howick’s request for oral argument is denied.