



In the Matter of:

GEOFFREY R. COATES,

ARB CASE NO. 05-050

COMPLAINANT,

ALJ CASE NO. 2004-STA-60

v.

DATE: July 31, 2007

SOUTHEAST MILK, INC.,

RESPONDENT.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:

Geoffrey R. Coates, *pro se*, Citrus Springs, Florida

For the Respondent:

Robert G. Riegel, Jr., Esq.; Alva L. Cross, Esq., *Coffman, Coleman, Andrews & Grogan, P.A.*, Jacksonville, Florida

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA) at 49 U.S.C.A. § 31105 (West 1997). Geoffrey R. Coates (Coates) contends that his employer, Southeast Milk, Inc. (SMI) fired him from his position as a truck driver in retaliation for claims he made to federal and state agencies, to members of the SMI cooperative, managers, and drivers, and to other businesses in the area that SMI violated several federal and state laws, including truck safety requirements of STAA. The administrative law judge (ALJ) below granted SMI's motion for summary decision and dismissed Coates' complaint. Coates appeals. We conclude that summary decision for SMI is appropriate.

BACKGROUND

The following facts are undisputed. SMI is a dairy cooperative which, among other things, transports milk throughout Florida, Georgia, Tennessee, and Alabama. SMI hired Coates as a truck driver in June 2003. Soon thereafter, Coates announced that he would be the spokesman of an “Ad Hoc Drivers Committee” and began issuing letters, memos, and e-mails about SMI to SMI co-op members, officers, managers, and truck drivers, the National Labor Relations Board (NLRB), the United States Environmental Protection Agency (EPA), the United States Department of Labor (DOL), the United States Department of Homeland Security, the Florida Department of Agriculture, members of Congress and others. In these documents Coates accused SMI of price fixing, dumping spoiled milk, selling contaminated milk, forging bills of lading, requiring truck drivers to exceed federal limits on hours of duty, illegally withholding overtime pay for truck drivers, operating unsafe trucks, and interfering with his Constitutional right of free speech.

On May 15, 2003, Human Resources Manager, Vickie Rose, orally reprimanded Coates for overwhelming SMI officers and managers with his complaints. She told him that managers were spending too much time responding to him; the fact that his concerns were often based on false assumptions or incorrect information made their task especially time consuming. Rose told Coates that in the future he must send all his concerns to the Human Resources Department, which would oversee SMI’s response process. She also told him that he was free to complain to other drivers, but not on company time. If Coates did not follow these instructions, Rose warned him, he could be fired.

Five days later, on May 20, Chief Financial Officer Albert Antoine, General Manager Pamela Yoder,¹ and Rose met with Coates because, after his meeting with Rose, Coates sent memos criticizing SMI to all managers and to the members of the cooperative. In an accompanying written reprimand, Antoine warned Coates that if he continued to communicate his concerns about the management of the company to supervisors or managers, co-op members or anyone in a business relationship with SMI, “you will be terminated.”

Geoffrey, to the extent you have concerns about the Company and its practices, we encourage you to direct those concerns to the Human Resources Department so your concerns can be investigated, and, if necessary, corrected. Failing to follow the proper procedure for doing

¹ Pamela Yoder changed her last name to Roland at some point during the proceedings below. Because most of the documents in the record refer to her as Pamela Yoder, we use that last name throughout this decision for simplicity’s sake.

so as instructed is insubordination and is disruptive to the operations of the Company. Further, making allegations against the Company, if untrue, and improperly communicating them to third parties could constitute unlawful trade slander. Therefore, by directing your concerns solely to the Human Resources Department, you can assist the Company in understanding and responding to your concerns, and you can avoid engaging in conduct that may be detrimental to the Company and expose you to potential liability

On July 1, Coates again wrote directly to Antoine, with a copy to SMI's Chief Executive Officer, complaining that SMI trucks were equipped with unsafe ladders and landing gear. Coates added that he planned to notify OSHA about these conditions.

On July 25, 2003, Rose notified Coates by letter that SMI was suspending him for three days without pay for his most recent correspondence to Antoine and the CEO. "Please let this suspension serve as a final warning that, if you violate the May 20 memo again, we will proceed with the termination of your employment."

In September, Coates formally complained to OSHA about the truck ladders and landing gear. OSHA investigated Coates' complaints and concluded that they lacked merit.

On November 3, 2003, Coates notified all SMI truck drivers that he had created a website ("www/geocities.com/grumpy651") where he would be posting information about SMI and where drivers could post their own notices. On November 6, an employee of the Florida Department of Agriculture e-mailed Coates' "grumpy" web address to Yoder with the comment, "Pamela, have fun with this one."

Yoder navigated to the "grumpy" site and discovered the following statement: "Federal Criminal Complaints of Embezzlement [sic] of Earned Wages are filed with Wage and Hour." At some point before Monday afternoon November 10 (the parties dispute the timing), Yoder recommended to Antoine, and Antoine agreed, that SMI should fire Coates.

On Sunday November 9, 2003, Coates sent Yoder an e-mail accusing her of lying to the OSHA investigator who investigated Coates' truck safety complaints. Yoder read the e-mail on Monday November 10.

When Coates completed his shift on Monday afternoon, Antoine and Yoder met with him to tell him he was fired. That evening, Coates wrote a "memo for the record," in which he said that Antoine "stated that I had made defamatory remarks about SMI on the Ad Hoc Driver's Committee web site. I was surprised, and remarked that then he would have to sue me. . . . Asserting that he had sought and received approval from SMI's attorney, he simply stated that my employment was terminated."

In December, Coates wrote to the Secretary of Homeland Security, Tom Ridge, complaining about his termination from SMI. Coates described some of his specific concerns – price fixing, selling spoiled milk, violating federal overtime pay requirements and truck safety requirements – which in his view compromised national security. Coates copied federal and state agencies, including OSHA.

OSHA treated their copy of Coates' letter to Ridge as a complaint that SMI fired him in retaliation for his November 9, 2003 e-mail accusing Yoder of lying to the OSHA inspector. After an investigation, OSHA concluded that Coates' September 2003 safety complaints to OSHA and his November 9 letter to Yoder were protected activity within the scope of STAA, but that those activities played no role in SMI's decision to fire Coates.

Coates requested a hearing, and his complaint was assigned to a Labor Department ALJ. Coates moved for partial summary decision on the merits, with a hearing to be held solely on the question of damages. SMI opposed the motion, submitting affidavits by Yoder and Antoine stating that Coates' complaint to OSHA about truck safety and his November 9 e-mail accusing Yoder of lying to OSHA had nothing to do with their decision to fire him. Both Yoder and Antoine averred that they decided to fire Coates on Friday November 7, and their sole reason for doing so was the false and defamatory embezzlement statement on Coates' website.

The ALJ denied Coates' motion for partial summary judgment and granted SMI's motion for summary judgment dismissing the complaint. The ALJ concluded that nothing in the record supported Coates' claim that his protected STAA activity contributed to SMI's decision to fire him.

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 STAA. *See* 29 C.F.R. § 1978.109(c)(2) (2006). *See also* 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 STAA).

In reviewing an R. D. & O. which recommends a final disposition of a STAA whistleblower complaint based on the ALJ's weighing of the evidence and resolution of the parties' factual and legal disputes, we review the ALJ's fact findings under the substantial evidence standard. 29 C.F.R. § 1978.109(c)(3). The substantial evidence standard does not apply to our review of summary decisions. 29 C.F.R. § 18.40 (2006). At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact, and we do the same. *Farrar v. Roadway Express*, ARB No. 06-003, ALJ No. 2005-STA-46, slip op. at 6 (ARB Apr. 25, 2007) (ARB reviews summary decisions under § 31105 of STAA de novo).

The determination whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Saporito v. Cent. Locating Servs, Ltd.*, ARB No. 05-004, ALJ No. 2001-STA-013, slip op. at 4 (Feb. 28, 2006). A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for either party. *Id.* If the complainant fails to establish an element essential to his case, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges is similar to that found in Fed. R. Civ. P. 56, which governs summary judgment in the federal courts. *Saporito, supra*. Summary decision is appropriate for either party “if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56(c).

When a motion for summary decision is made and supported as provided in the rule, the party opposing the motion may not rest upon the mere allegations or denials of its pleadings but must set forth specific facts which could support a finding in its favor. 29 C.F.R. § 18.40(c). *Anderson*, 477 U.S. at 252. “[T]here is no genuine issue if the evidence presented in the opposing affidavits (or other admissible evidence) is of insufficient caliber or quantity to allow a rational finder of fact to find for that party.” *Id.* at 254. The nonmoving party must come forward with sufficient rebuttal evidence to show that if the case went to trial, the jury could find in the nonmoving party’s favor. *Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 03-ERA-32, slip op. at 4 (ARB Mar. 29, 2005) (mere speculation about how the employer might have become aware of complainant’s protected activity is not sufficient rebuttal evidence); *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1776 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). When, as in this case, the parties are in dispute about the Respondent’s motive, the mere possibility that the ALJ might, and legally could, disbelieve the Respondent’s evidence at the hearing is not sufficient to establish a genuine issue of fact as to the Respondent’s state of mind at the summary decision stage. *Anderson*, 477 U.S. at 256-257.

DISCUSSION

A. The Legal Standard

The STAA prohibits certain employers from retaliating against employees who complain about or report violations of commercial motor vehicle safety requirements:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding
....

49 U.S.C.A. § 31105(a)(1)(A).

To prevail on a § 31105(a)(1)(A) complaint, the employee must prove by a preponderance of the evidence that (1) he engaged in activity protected by STAA, (2) the employer was aware of the protected acts, (3) the employer took an adverse personnel action against the employee, and (4) the existence of a “causal link” or “nexus,” between the protected activity and the adverse action.

In STAA cases the Board adopts the burdens of proof framework developed for pretext analysis under Title VII of the Civil Rights Act of 1964, as amended, and other discrimination laws, such as the Age Discrimination in Employment Act. Under this burden-shifting framework, the complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated the STAA. Only if the complainant makes this prima facie showing does the burden shift to the employer to articulate a nondiscriminatory reason for the adverse action. If the respondent does identify a nondiscriminatory reason, the complainant then must prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-18, slip op. at 13 (ARB May 24, 2007);

In the summary decision context, this means that the employee is entitled to summary decision if he shows sufficient evidence of the employer's retaliatory intent to compel a reasonable jury to find that the employer intended to retaliate – unless the employer produces evidence of a nondiscriminatory/nonretaliatory reason for its actions. In that event, summary decision for the employee is not appropriate unless the employee shows evidence sufficient to support a jury finding that the employer's purported nondiscriminatory reason is false and that its true motive was at least in part retaliatory/discriminatory. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Bettner, supra*.

Once the employee has proved by a preponderance of the evidence that the employer did act against him at least in part because he engaged in protected activity, the

only means by which the employer can escape liability is by proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of protected activity. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Mourfield v. Frederick Plaas*, ARB No. 00-055, ALJ No. 99-CAA-13, slip op. at 5 (ARB Dec. 6, 2002).

In the summary decision context, this means that a reasonable fact finder, considering all the admissible evidence the parties have offered, would be compelled to find that the employer would indeed have taken the adverse action even if the employee had not engaged in protected activity.

B. The Issues for Decision on Review

1. Whether ARB has “jurisdiction” over all Coates’ complaints

Coates asserts that the Administrative Review Board has “jurisdiction” over all his complaints against SMI, ranging from noncompliance with STAA, to unlawful interference with his First Amendment rights and right to engage in concerted activities under the National Labor Relations Act, and so on. C. Br. at 2.

The term “jurisdiction” has a very specific meaning. An adjudicative agency or court with “jurisdiction” over a particular complaint is one that has been authorized by Congress to determine the merits of a particular dispute between parties and to grant relief to a successful plaintiff. *See OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 10 (ARB Dec. 21, 1999). Of all the laws Coates invokes, only STAA gives the Secretary of Labor jurisdiction to investigate and adjudicate employee whistleblower complaints related to violations of commercial motor vehicle safety. 49 U.S.C.A. § 31105(b)(1) (“An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section . . . may file a complaint with the Secretary of Labor. . .”).² Whether Coates’ other complaints against SMI have merit or warrant relief lies within the jurisdiction of other agencies, such as the National Labor Relations Board, EPA, the Florida Department of Agriculture, etc. Thus, Coates is simply wrong when he asserts that because we have jurisdiction over his STAA complaint, we have “jurisdiction” over all his complaints. *Cf. Mourfield, supra*, at 7-8 (“we reject Mourfield’s argument that motives that are illegal under other laws, such as the National Labor Relations Act or the Occupational Safety and Health Act, establish discrimination under the environmental whistleblower laws” and “complaints or activities protected under other laws not even touching upon health and safety, such as the right to organize under the NLRA, are not protected under the environmental whistleblower laws.”)

² As we noted earlier in the text, the Secretary of Labor delegated her adjudicative function under STAA to the Administrative Review Board. She delegated her investigatory function under STAA to OSHA. *See* Secretary’s Order No. 9-83, 48 Fed. Reg. 35,736 (Aug. 5, 1983).

However, to the extent evidence of Coates' interactions with SMI shed light on SMI's reasons for firing Coates, we may consider the totality of Coates' interactions with SMI in determining whether Coates has shown a genuine issue on a material matter of fact, viz., whether SMI's motive was discriminatory.³

Whether SMI is entitled to Summary Decision

a. The parties' arguments

Coates has proceeded without benefit of counsel throughout this proceeding. His briefs on review consist almost entirely of conclusory arguments, such as, "Complainant has a right, and duty under law, to object and dissent from SMI's bossing and bullying workers to ignore truck safety and violations of the Hours of Service Regulations, dumping of contaminated milk into land/groundwater and forging documents causing tampered milk to flow into Florida's commercial milk supply, violating STAA and TSCA whistleblower provisions, and further, by firing Complainant for lawfully filing such reports." C. Supp. Br. at 1. Although Coates correctly states the legal framework applicable to summary disposition, e.g., C. Br. at 6, he argues the merits of the evidence and ignores procedural requirements relevant to summary decision, such as the requirement that the nonmoving party produce specific evidence to rebut a well pleaded motion for summary decision and not rely solely on speculation.

³ Coates also argues that the ALJ erred in not permitting him to amend his complaint to add a charge of discrimination under the Toxic Substances Control Act (TSCA) at 15 U.S.C.A. 2622. Coates had criticized SMI for polluting ground water by dumping spoiled milk, and he believed that company documents he acquired through discovery would support a TSCA whistleblower complaint.

The ALJ did not err in denying Coates' motion. An employee seeking to invoke the protection of the TSCA whistleblower provision must submit his complaint to the Secretary of Labor (via OSHA) for investigation within 30 days of the adverse personnel action he seeks to challenge. 15 U.S.C.A. § 2622(b)(1) (West 1998). The employee then has five business days from receipt of OSHA's investigative findings within which to request a hearing. 29 C.F.R. § 24.4(b)(2). Thus, the OSHA investigation is an absolute prerequisite for a hearing and subsequent appeals. As Coates never filed a TSCA complaint with OSHA, and OSHA never issued a notice of determination concerning Coates' TSCA-related complaint, the ALJ had no power to adjudicate such a complaint. *Cf. Marshall v. N. Am. Car Co.*, 626 F.2d 320, 324 (3d Cir. 1980) ("once OSHA begins citation proceedings, the proper course is for an employer to exhaust OSHA procedures and then raise contentions in an appeal from the finding of a violation"); *Bozeman v. Per-Se Techs.*, 456 F. Supp. 2d 1283, 1358 (N.D. Ga. 2006) (employee whose complaint to OSHA did not name certain individuals as respondents deprived OSHA of the opportunity to investigate their actions; therefore, the employee failed to exhaust his administrative remedies).

While a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance. *Griffith v. Wackenhut Corp.* ARB No. 98-067, ALJ No. 97-ERA-052, slip op. at n.7 (ARB Feb. 29, 2000). Pro se complainants have the same burdens of production and persuasion as complainants represented by counsel. *Cf. Canterbury v. Administrator*, ARB No. 03-135, ALJ No. 02-SCA-11, slip op. at 3-4 (ARB Dec. 29, 2004). We will, however, read the papers of a pro se complainant liberally and interpret them to raise the strongest arguments suggested therein. *Griffith, supra.*; *cf. Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

Thus, we have studied Coates' briefs carefully to find the strongest arguments suggested therein. To the best of our understanding, Coates appears to make two arguments on the question of SMI's motive: First, Coates argues, SMI's negative responses to all his concerns – overtime pay, polluting the environment by dumping spoiled milk, price fixing, unsafe trucks, critical statements on the grumpy website, etc. – show that SMI was hostile to any criticism, or at least any criticism from Coates. SMI's wish to quell Coates' complaints about truck safety were part and parcel of the company's wish to quell Coates on any subject. For that reason, SMI's hostility to his truck safety complaints cannot be separated from its hostility to his "embezzlement" statement on the web, which was a mere variant on his earlier complaints that SMI was not paying drivers overtime as required by federal law. Thus, Coates' truck safety complaints must have contributed to SMI's ultimate decision to fire him. Secondly, Coates argues, no evidence in the record supports SMI's claim that they would have fired Coates even if he had never engaged in STAA-protected activity.

SMI argues first that Coates failed to respond to SMI's motion with evidence capable of rebutting Yoder and Antoine's sworn statements that they fired him solely because he posted a defamatory statement after being warned that doing so would result in termination of employment. Indeed, in support of his own motion for partial summary judgment, Coates offered documentary evidence of SMI's repeated warnings to stop disseminating false and derogatory information about SMI or lose his job. He also provided his own contemporaneous "memo for the record" in which he corroborated Yoder and Antoine's affidavits: "Mr. Antoine stated . . . that I had made defamatory remarks about SMI on the Ad Hoc Driver's Committee web site." CX 31, attachment to C. Mo. for Partial Summary Dec., filed October 27, 2004. Thus, Coates did not make a sufficient showing on the question of motive, another essential element of his STAA complaint. SMI Br. at 14-15. Thus, SMI was entitled to summary decision on that ground alone and need never have produced evidence of its non-retaliatory motive.

Be that as it may, SMI argues, the company did produce evidence on which a reasonable jury could make a finding of non-retaliatory motive, as well as evidence to support a finding that SMI would have fired Coates for the defamatory statement even if he had never mentioned truck safety issues. SMI Br. at 18-21. Coates' failure to rebut SMI's evidence with contrary evidence of his own means that a reasonable juror would be compelled to find that SMI would have fired Coates for the embezzlement statement

even in the absence of STAA-protected activity. This is yet a third basis for granting SMI's motion for summary decision.

b. Summary Decision for SMI is appropriate

Coates' first argument is that SMI's continuing efforts to stop him from disseminating any of his criticisms support the inference that SMI fired him not for one criticism – a charge of embezzlement on the web – but for all his criticisms, including his truck safety complaints. This argument is not without logic, but it is not a sufficient response to SMI's well supported motion for summary decision. Coates is, in effect, arguing that if the case went to a hearing, a reasonable fact finder could disbelieve Yoder and Antoine's specific testimony about their motives and instead draw the inference Coates suggests.

The mere possibility that the fact finder might reject the moving party's evidence on credibility grounds is not enough to forestall summary judgment for the moving party. In its motion for summary decision, SMI presented evidence that, if not rebutted by Coates, would entitle SMI to summary dismissal of the complaint as a matter of law. The evidence on which SMI relied included Antoine and Yoder's sworn statements that they fired Coates because of the defamatory statement on the grumpy web site – exactly as they had warned Coates in July would happen. At that point in the proceedings, it became Coates' burden to identify specific evidence that could support a finding that Antoine and Yoder's reasons for firing him included retribution for making truck safety complaints.

The only evidence Coates offered to rebut Antoine and Yoder's testimony was an undated document titled "Index of /grumpy651/fileroom/images." CX 45, attachment to Coates' Response to Motion for Summary filed January 6, 2005. This document purports to show that the grumpy651 website was modified 13 times on November 10, 2003, and during December 2003 and February 2004. Coates offers the document as evidence that Antoine and Yoder must have been lying about their reason for firing him. According to Coates, they could not have based their Friday November 7 decision to fire him on the contents of the grumpy website, because he did not post the embezzlement statement until Monday, November 10.

It need hardly be stated that a document showing that Coates' website was modified at certain times proves nothing about the content of the website during the relevant period, November 6 through November 10. Indeed, the record contains not a single piece of evidence that would entitle a jury to find that the embezzlement statement did not appear on the grumpy website until November 10.

Coates also argues that we can infer that his truck safety complaints contributed to SMI's termination decision from the fact that he had accused Yoder of lying to OSHA about truck safety the day before she and Antoine fired him. But Yoder stated in her affidavit that she read Coates' memo on Monday November 10, two days after deciding

to fire Coates. Coates has never disputed her statement that she did not read his memo until after she decided Coates must be fired.

Moreover, Coates actually corroborated Yoder and Antoine's testimony with his contemporaneous "memo for the record" in which he wrote that Antoine told him he was being fired because he put a false and defamatory statement about SMI on the web. SMIGC.DP 17, attachment to SMI Motion for Summary Decision, filed December 23, 2004. Finally, Coates himself submitted copies of the written reprimands in which Rose and Antoine each warned him that if he made one more false and derogatory statement, he would be fired. CX 10, CX 11, CX 12, attachments to C. Motion for Partial Summary Judgment filed Oct. 27, 2004.

In response, Coates offers his unsupported allegation that his embezzlement statement could not have been the reason SMI terminated his employment, because it did not appear until November 10 – after Yoder and Antoine made their decision. Moreover, if the case went to hearing, the fact finder might not find Antoine and Yoder's testimony credible. This is not evidence; it is mere speculation. Thus, SMI was entitled to summary judgment at this point on procedural grounds alone.

Moreover, SMI is correct in arguing that, in any event, they would be able to prove by a preponderance of the evidence that they would have fired Coates because of the embezzlement statement even if he had never complained about truck safety. Coates' disciplinary record shows that SMI warned him in July that if he made one more defamatory statement about SMI, he would be fired. Coates does not deny this or offer any evidence that would entitle a reasonable fact finder to conclude that Antoine and Yoder were doing anything other than taking the precise disciplinary action they had warned Coates about in July – before Coates complained to OSHA about truck safety. Accordingly, SMI is entitled to summary dismissal as a matter of law.⁴

3. The ALJ did not abuse his discretion in limiting Coates' scope of discovery

Coates asserts that if he failed to make his case, it is because the ALJ did not allow him adequate opportunity for discovery. C. Br. at 14. Shortly after Coates' complaint was assigned to the ALJ, Coates submitted requests for admissions and interrogatories to SMI. SMI answered in part, but objected to some of Coates' requests as overly vague, broad, burdensome or ambiguous, not related to the STAA complaint being litigated, or protected by privilege or attorney work product. Coates moved for an order to compel SMI to produce a privilege log identifying each document SMI was

⁴ Even if it were true that Coates' truck safety concerns did contribute to Yoder and Antoine's decision to fire him and that the embezzlement statement did not appear on the web until November 10, SMI would still be entitled to summary decision. That is because the record strongly supports SMI's claim that they would have fired Coates even if he had not made truck safety complaints and at the same time provides no basis for a reasonable fact finder to find otherwise.

withholding on grounds of privilege and to respond fully to his other discovery requests. Before the ALJ ruled on Coates' motion to compel discovery, Coates also filed for partial summary decision on the ground that the only issue in dispute – SMI's reason for firing him – should be resolved in his favor forthwith. Thus, when the ALJ considered Coates' motion for more discovery, it was clear that the dispute between the parties was rapidly devolving to a question of motive and was likely to be decided by summary decision.

Labor Department ALJs have authority to limit discovery. 29 C.F.R. § 18.29.⁵ We review ALJ rulings on scope of discovery under the abuse of discretion standard. *Saporito*, slip op. at 10. To establish abuse of that discretion, the appellant must, at a minimum, show how further discovery could have permitted him to rebut the movant's contentions. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 599 (1998) (the district court may postpone discovery on all issues except whether the plaintiff engaged in protected activity when lack of protected activity is the gravamen of the defendant's motion for summary judgment).

In this case, the ALJ concluded that SMI had responded to Coates' interrogatories and other discovery requests as well as possible, given the somewhat broad and vague nature of the questions, e.g., asking SMI to turn over every company record, written or otherwise, with Coates' name on it. "Having reviewed the Complainant's interrogatories and requests for production as well as the answers and documents produced by Respondent, the court finds that Respondent has fully cooperated in the discovery process." Pre-hearing Order # 6, issued Jan. 3, 2005. At no point did Coates suggest how or why any of the information that SMI did not turn over could be expected to help him prove any issue connected to his STAA complaint. On the contrary, Coates makes clear that his discovery requests are meant to help him establish all his theories about SMI – overtime pay, excessive hours on duty, concerted activities, environmental pollution, First Amendment free speech rights, and so on. Under the circumstances, we cannot say that the ALJ abused his discretion in limiting discovery.

⁵ Rule 18.29(a)(8), 29 C.F.R., provides in pertinent part:

§ 18.20 Authority of administrative law judge.

(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:

(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 therefore

CONCLUSION

Accordingly SMI is entitled to summary decision, and we hereby **DISMISS** Coates' complaint.⁶

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁶ Because Coates failed to carry his burden on the causality element of his claim, we need not decide whether the existing record could support a finding that Coates' truck safety complaints related to a violation of a commercial motor vehicle safety law.