U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 March 2006

Case No.: 2005-CAA-00013

In the Matter of:

THOMAS SAPORITO,
Complainant,

v.

ASPLUNDH TREE EXPERT COMPANY, D/B/A CENTRAL LOCATING SERVICE, INC.,
Respondent.

Before: WILLIAM S. COLWELL
Administrative Law Judge

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

For the Respondent:
Steven R. Semler, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the employee protection provisions contained in the Clean Air Act (CAA), 42 U.S.C. § 7622; the Toxic Substances Control Act (TSC), 15 U.S.C. § 2622; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; the Safe Drinking Water Act (SDW), 42 U.S.C. § 300j – 9; the Solid Waste Disposal Act (SWD), as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6971; and the Energy Reorganization Act, 42 U.S.C. § 5851. These statutes and the implementing regulations at 29 C.F.R. § 24 protect employees from retaliation by their employers for engaging in protected activity such as reporting violations of the health, safety or environmental standards contained in these statutes. In this case, Complainant, Thomas Saporito, has alleged that Respondent, Central Locating Service, Inc., made a retaliatory threat in violation of the these statutes and regulations.

BACKGROUND OF THIS CASE

After being discharged from his job with Respondent on January 8, 2004, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, claiming that the loss of his job was retaliation for having raised various occupational and environmental safety concerns. That complaint was investigated by OSHA, who determined that there had been no retaliatory action, and Complainant appealed that determination to the Office of Administrative Law Judges (OALJ), U.S. Department of Labor for a formal hearing and decision.

While that claim was pending before the OALJ, Complainant sent a settlement offer to Respondent that included a detailed description of all the legal expenses that Complainant anticipated being able to force the Respondent to incur through ongoing appeals and other litigation tactics. The settlement offer was declined, and on October 6, 2004, the Administrative Law Judge (ALJ) granted summary decision against Complainant in that case, because Complainant had failed to establish that he engaged in any protected activity. Complainant then gave notice of his intention to appeal that decision to the Administrative Review Board (ARB). *Saporito v. Central Locating Service, Inc.*, ALJ No. 2004-CAA-13 (ALJ October 6, 2004).

While his appeal of his first complaint was pending before the ARB, Complainant filed an additional complaint against Respondent with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination. On March 12, 2005, after the EEOC had dismissed this complaint, Complainant sent another settlement offer to Respondent. On March 14, 2005, counsel for Respondent sent Complainant a reply letter in response to this settlement offer. The reply letter included a statement that Respondent had instructed its counsel to investigate filing a civil suit against Complainant for what Respondent perceived to be "bad faith, frivolous and extortionate litigation." Complainant alleges this statement was a retaliatory action in violation of the statutes enumerated *supra*, and it is out of this alleged threat in the reply letter that the instant case arises.

On March 20, 2005, Complainant filed a new complaint with OSHA regarding the contents of Respondent's March 14, 2005 reply letter. OSHA investigated this complaint until April 14, 2005 when Complainant requested that OSHA conclude its investigation and make a determination based on the evidence it had at that time. On April 21, 2005, OSHA issued a determination that the complaint was without merit and dismissed it. Complainant appealed to the OALJ, U.S. Department of Labor, on April 29, 2005, and a Notice of Hearing was issued on May 5, 2005. On May 10, 2005, Respondent filed a Motion to Postpone the scheduled hearing and any pre-hearing exchange pending decision on its Motion to Dismiss. Respondent filed its Motion to Dismiss with accompanying attachments on May 12, 2005.[1]

[1] The following abbreviations will be used as citations to the record:
Resp't Mot. to Dismiss: Respondent's Motions to Dismiss Complainant's Complaint
Com. Am. Compl.: Complainant's Amended Complaint

Subsequently, Complainant filed an Amended Complaint on May 19, 2005, which alleged that additional retaliatory behavior had occurred after the filing of the original complaint. Respondent filed a Motion to Strike the Amended Complaint on May 19, 2005. Complainant then submitted a brief in opposition to Respondent's Motions to Dismiss and to Strike with accompanying affidavit on June 1, 2005, and Respondent submitted a brief in Reply to Complainant's Opposition on June 2, 2005. I issued an Order Canceling Hearing and Continuing Discovery Pending Decisions on Respondent's Motions on June 14, 2005.

On August 4, 2005, Complainant submitted a Second Amended Complaint, which added additional details to his allegations. Respondent moved to dismiss Complainant's Second Amended Complaint on August 9, 2005. Complainant submitted a brief in opposition to this motion on August 16, 2005.

RESPONDENT'S MOTION TO STRIKE

On May 19, 2005, Complainant filed his Amended Complaint, which added a second allegation of adverse employment action to his first allegation of the retaliatory threat in Respondent's reply to his settlement offer. Com. Am. Compl. at 2-3. The amended complaint sought to add the new allegation that Complainant reapplied for employment with Respondent on May 10, 2005 and received no response to his application. *Id*. Respondent filed a motion to strike this amended complaint on the grounds that: Complainant failed to exhaust his administrative remedies, Complainant failed to seek leave to amend his complaint, the amendment addresses a "substantively new and different charge," and the new claim is barred by collateral estoppel. Resp't Mot. to Strike at 2, 4, & 5.

Proceedings before an ALJ in the Department of Labor are generally conducted according to the procedural rules set out in 29 C.F.R. § 18. For any procedural issue not addressed by those rules, the Federal Rules of Civil Procedure govern. 29 C.F.R. § 18.1(a). Since the rules set out in 29 C.F.R. § 18 do not address motions to strike, Respondent's Motion to Strike is governed by Federal Rule of Civil Procedure 12(f). Under that provision, "the court may order stricken from any pleading any insufficient

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Resp't Mot. to Strike: Respondent's Motion to Strike Complainant's Amended Complaint
Com. Opp'n: Complainant's Opposition to Respondent's Motions to Dismiss and Strike
Com. Aff.: Complainant's Affidavit in Support of Complainant's Opposition to Respondent's Motions to Dismiss and Strike
Resp't Reply: Respondent's Reply to Complainant's Opposition
Com. 2nd Am. Compl.: Complainant's Second Amended Complaint
Resp't 2nd Mot. to Dismiss: Respondent's Motion to Dismiss Complainant's Second Amended Complaint
Com. 2nd Opp'n: Complainant's Opposition to Respondent's Motion to Dismiss Complainant's Second Amended Complaint

defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

It is clear from the arguments in Respondent's Motion to Strike that the motion is, in fact, a motion to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted and not a motion to strike under the standard set out in Federal Rule of Civil Procedure 12(f). Since the technical name of a motion is irrelevant to its substantive merit, Respondent's Motion to Strike will be treated as a motion to dismiss. 5C Fed. Prac. & Proc. Civ.3d §1380 n.7. As such, it will be discussed *infra* with Respondent's Motion to Dismiss and Respondent's Motion to Dismiss Complainant's Second Amended Complaint.

COMPLAINANT'S AMENDED COMPLAINT AND SECOND AMENDED COMPLAINT

In addition to his Amended Complaint discussed *supra*, Complainant submitted a Second Amended Complaint on August 4, 2005. This second amended complaint sought to expand the allegations concerning his reapplication for employment with Respondent to include new details about a visit he made to Respondent's offices in July to follow up on his May 10, 2005 application. Com. 2nd Am. Compl. at 2. Both amended complaints concern events which occurred after the date of the original complaint. Com. Am. Compl. at 2-3; Com. 2nd Am. Compl. at 2.

Under 29 C.F.R. § 18.5(e), pleadings "setting forth transactions, occurrences, or events which have happened since the date of the pleadings" are "supplemental pleadings." An administrative law judge "may" permit supplemental pleadings that "are relevant to any of the issues involved." *Id*. Since the two amended complaints filed by Complainant concern events that occurred since the date of the original complaint, they are supplemental pleadings. As such, they may be permitted if they are relevant to any of the issues in this case.

Although Complainant failed to request the leave of this Court to amend his complaint, his two offered amendments do satisfy the relevance standard of 29 C.F.R. § 18.5(e). In an environmental whistleblower case, the primary issues are whether an employee has engaged in protected activity of which his employer is aware, whether he has suffered adverse employment action, and whether a nexus exists between the protected activity and the adverse employment action. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ No. 2000-CAA-20 at 6 (ARB June 30, 2004).[2] Complainant's offered amendments allege additional retaliatory action by

[2] The various environmental acts at issue contain similar statements of the activities that are protected. For example, the employee protection provision of the CAA, 42 U.S.C. § 7622(a)(1-3), provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of

Respondent in response to the same alleged protected activity. Thus, the two amendments are relevant to the issues of adverse employment action and the nexus between protected activity and adverse employment action, and they will be permitted.

RESPONDENT'S MOTIONS TO DISMISS

In addition to Respondent's Motion to Strike, which will be considered here as a motion for dismissal, Respondent has filed two other motions to dismiss in this case, one in response to Complainant's original complaint and one in response to his Second Amended Complaint. Since Complainant's three complaints have all been permitted and will be considered together, Respondent's three motions to dismiss will also be considered together. Respondent's first motion to dismiss included seven attachments of materials outside the pleadings, and Respondent's third motion to dismiss also included an attachment. When a party submits evidence outside of the pleadings for consideration with a motion to dismiss, that motion must be treated as a motion for summary decision instead. *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 at 6 n.3 (ARB July 31, 2001). Thus, Respondent's motions to dismiss must be considered together as a motion for summary decision under 29 C.F.R. § 18.40.

STANDARDS FOR SUMMARY DECISION

The Eleventh Circuit, under whose jurisdiction this case falls, has held that "a motion for summary judgment should only be granted against a litigant without counsel if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default." *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d. 287, 289 (11th Cir. 1992). The danger of a *pro se* litigant being prejudiced by an unfamiliarity with procedural requirements, however, is ameliorated when that *pro se* litigant has gained familiarity with relevant procedure through past experience with similar litigation. *Hasan v. Enercon Services, Inc.*, ARB No. 04-045, ALJ No. 2003-ERA-31 at 3-4 n.1 (ARB May 18, 2005). When that is the case, the pro se litigant is not afforded as much latitude. *Id*.

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employment because the employee (or any person acting pursuant to a request of the employee) -

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

In this case, Complainant is a litigant without counsel, but he has demonstrated that he is aware of both the procedures and the stakes of summary decision. First, he has written each of his opposition briefs in this case, not as oppositions to motions to dismiss, but as oppositions to motions for summary decisions. Com. Opp'n at 4-5; Com. 2nd Opp'n at 1-3. In his briefs, Complainant explains the standards for summary decision, the fact that Respondent's motions to dismiss will be treated as motions for summary decision, and the need for the submission of affidavits and supporting materials. *Id*. Second, Complainant has submitted an affidavit in support of his position. Third, Complainant received clear notice of the requirements and consequences of summary decision during Complainant's previous case against Respondent. *Saporito*, ALJ No. 2004-CAA-13 at 2 n.2. Finally, Complainant has a great deal of experience with federal whistleblower litigation.[3] Therefore, no further notice or explanation of the summary decision process is required in this case.

Motions for summary decision in proceedings before an Administrative Law Judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, ALJ No. 2000-ERA-6 at 6 (ARB Jan. 30, 2001).

If the moving party can establish that there is no genuine issue of material fact and that they are entitled to summary decision, the burden is shifted to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Electric. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21 at 4 (ARB May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden, but rather, must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to meet this burden as to any of the required elements of his case, all other factual issues become immaterial and there can be no genuine issue of material fact. *Id.*, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

[3] *See* e.g. *Saporito v. GE Medical Systems & Adecco Technical*, 2005-CAA-7 (ALJ May 20, 2005); *Saporito v. The Atlantic Group, Inc.*, ALJ Nos. 93-ERA-26, 93-ERA-45, and 94-ERA-29 (ALJ November 15, 2004); *Saporito v. Central Locating Service, Inc.*, ALJ No. 2004-CAA-13 (ALJ October 6, 2004); *Saporito V. Bellsouth Corporation*, ALJ No. 2004-CAA-00008 (ALJ March 15, 2004); *Saporito v. U.S. Department of Labor*, ALJ No. 2003-CAA-00009 (ALJ February 12, 2003).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of Complainant's Evidence

Complainant was employed with Respondent Central Locating Service, Inc. (CLS) as a locator technician from July 21, 2003 to January 8, 2004, when he was discharged. Com. Aff. at 1. He then filed a complaint with OSHA alleging retaliatory action. Com. Opp'n at 3. Once OSHA finished its investigation and found no retaliatory action, Complainant appealed its findings to the Office of Administrative Law Judges for a formal hearing and decision. *Id*. His case was dismissed by the ALJ on October 6, 2004. *Id*. at 2. On March 12, 2005, Complainant sent an offer of settlement to Respondent while his appeal to the ARB was pending. *Id.*; Com. 2nd Opp'n at 4.

On March 14, 2005, counsel for Respondent sent Complainant a letter replying to his settlement offer. Com. Am. Compl. at 2. The letter declined the settlement offer and included the following language, which Complainant found objectionable: "The Company has also instructed me to evaluate the filing…of a civil action against you in federal or State court for causes of action related to your bringing what it regards to be bad faith, frivolous and extortionate litigation against it."[4] *Id*. On April 14, 2005, Complainant filed a new discrimination complaint with OSHA against CLS alleging that this letter constituted a threat in retaliation for his having engaged in protected activity by pursuing his previous lawsuit against Respondent. Com. Aff. at 2.

On May 10, 2005, while this case was pending, Complainant completed an application for a job with CLS as a locator technician. *Id*. at 3; Com. Am. Compl. at 2. Respondent did not respond to Complainant's application for employment. Com. Am. Compl. at 2. On July 28, 2005, Complainant visited Respondent's offices in person, and he requested a meeting with Luis Simone, a local manager with hiring authority, to discuss the application he submitted on May 10, 2005. Com. 2nd Am. Compl. at 2. Complainant was asked by Ward Culvert, another of Respondent's employees, to have a seat while he checked with Mr. Simone. *Id*. Mr. Culvert then returned and informed Complainant that Mr. Simone would not meet with him because "[he] filed a lawsuit against the company." *Id*. He was then told by Mr. Culvert that "[he] should contact the company's lawyers." *Id*.

Complainant generally alleges some additional facts. For example, he asserts that positions for which he is qualified remain open, that other candidates less qualified than he have been hired to fill them, and that other employees dismissed for cause have been rehired. He appears to make these assertions, however, based solely on his own beliefs, and none of these assertions are made with any particularity. No specific facts that could be proven are set out, and thus, these assertions are inadequate to satisfy Complainant's burden. *See Seetharaman*, ARB No. 03-029 at 4, *citing*

[4] Although Respondent has argued that this comment is inadmissible because it was part of a settlement dialogue, Federal Rule of Evidence 408 does not act as a shield to wrongful acts. 23 Fed. Prac. & Proc. Evid. § 5314. When the wrongfulness of such a statement is itself at issue in a case, the statement is admissible to determine whether or not the statement was a wrongful act. *Id*.

Anderson, 477 U.S. at 256 ("the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry [his] burden.").

Summary of Respondent's Evidence

Respondent's evidence does not contradict any of the facts set out *supra*, but it does provide additional information relevant to the disposition of this matter, all of which is uncontested by Complainant.

During Complainant's pursuit of his previous case against Respondent, he employed aggressive litigation tactics. First, on June 2, 2004, Complainant sent a settlement offer to Respondent that included a detailed description of all the legal expenses that Complainant anticipated being able to force the Respondent to incur through ongoing appeals and other litigation tactics. Resp't Mot. to Dismiss at Attach. 2.

Among the costs that Complainant implied Respondent would be forced to incur were the costs of representing "10 or more deponent witnesses," of handling a trial that could take "at least a week or maybe even longer to prosecute," of handling "an Appeal to the ARB," of handling "an Appeal to the Eleventh District Court of Appeals," of handling "an Appeal to the U.S. Supreme Court," and of handling "subsequent discrimination actions" from Complainant. *Id*. At the conclusion of the letter, Complainant directs Respondent to either accept the settlement or provide Complainant with the availability of thirteen named individuals so that Complainant can begin his extensive depositions. *Id*.

Additionally, the presiding Administrative Law Judge frequently had to reprimand Complainant for abusing the discovery process. *Id*. at 2. For example, Pre-Hearing Order #15 (September 16, 2004) from that case states that "Complainant continues to ignore my orders with regard to limitations on requests for production of documents." *Id.* at Attach. 4. Pre-Hearing Order #16 (September 16, 2004) includes the statement: "Once again, Complainant has flouted the Presiding Judge's limitations on discovery. Indeed, he has again simply ignored these limitations and continues to bombard Respondents with requests for documents which violate my order." *Id.* Finally, Pre-Hearing Order #22 (September 28, 2004) describes Complainant's discovery requests as "unconscionably burdensome." *Id.*

After Complainant's claim in his previous suit against Respondent was dismissed by the presiding Administrative Law Judge on October 6, 2004, Complainant repackaged his claim as a complaint to the U.S. Equal Employment Opportunity Commission (EEOC) alleging age discrimination. *Id.* at 2. On the EEOC charge sheet Complainant submitted on December 20, 2004, he described his discharge this way: "I believe that I was discriminated against because of my age…in violation of the Age Discrimination in Employment Act of 1967…and retaliated against under Title VII of the Civil Rights Act of 1964." *Id.* at Attach. 5. On February 25, 2005, the EEOC ended its investigation and determined that it was "unable to conclude that the information obtained establishes violations of the statutes." *Id*.

After the EEOC's February 25, 2005 decision, Complainant sent Respondent his March 12, 2005 settlement offer. Respondent replied to this offer with the letter containing the language objectionable to Complainant. The text preceding the alleged threat provides context for the statement objected to by Complainant:

> The Company has instructed me to advise you that it rejects your offer and will not make any counter offer to you at any time.
>
> Further the Company has instructed me to advise you that it will continue vigorously to defend, in any forum at any time, including appeals, what it regards to be your bogus and extortionate claims and demands which, to date, have uniformly been rejected in every forum which has considered them, at least three times to date. The Company has also instructed me to evaluate the filing, at an appropriate time, of a civil action against you in federal or State court for causes of action related to your bringing what it regards to be bad faith, frivolous and extortionate litigation against it.

Id. at Attach. 7. At this time, no action has been taken by Respondent to pursue any such claim. *Id.* at 4.

Discussion

As discussed *supra*, the three issues in a whistleblower case are whether (1) Complainant has engaged in protected activity of which Respondent was aware, (2) whether Complainant has suffered adverse employment action, and (3) whether a nexus exists between the protected activity and the adverse employment action. *Culligan*, ARB No. 03-046 at 6. If Respondent can demonstrate that no genuine issue of material fact exists as to any of these three issues and Complainant cannot put forth any specific facts that would establish a genuine issue of material fact, then Respondent is entitled to decision as a matter of law.

Protected Activity

In this case, Complainant alleges that he engaged in protected activity when he filed his initial complaint against Respondent with OSHA and pursued his subsequent appeal to the ALJ and his pending appeal to the ARB. There is no precedent establishing clearly whether filing a complaint under these whistleblower statutes to enforce rights allegedly violated after engaging in protected activity is itself a protected activity within the meaning of the statutes. Even if I assume in favor of the non-moving party that Complainant's utilization of his appeal rights is protected activity, however, Respondent would still be entitled to summary decision, because Complainant cannot demonstrate any genuine issue of material fact as to either adverse employment action or a nexus between such action and his allegedly protected activity.

Adverse Employment Action

Respondent's letter to Complainant containing the alleged threat did not constitute adverse employment action. In order for an action taken by an employer to constitute adverse employment action, a "tangible job consequence" must flow from it. *Shelton v. Oak Ridge Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 at 7-8 (ARB Mar. 30, 2001). Mere "criticism" or even a "reprimand" does not rise to the level of actionable adverse employment action without some tangible consequence related to "compensation, terms, conditions, or privileges of employment." *Id*. Even the filing of a libel action by a respondent against a complainant over comments made in that complainant's pursuit of his or her whistleblower case is "not an action 'with respect to the compensation, terms, conditions, or privileges of employment.'" *Hanna v. School District of the City of Allentown*, 1979-TSCA-1, slip op. at 2 (Sec'y. 1980).

In this case, Respondent's comments came with no tangible job consequences of any kind. Additionally, if actually filing a libel action over the content of the complaint in a whistleblower lawsuit is not an adverse employment action, then merely warning that a civil suit might be filed over "bad faith, frivolous and extortionate litigation" is certainly not an adverse employment action. Therefore, the alleged threat in this case cannot be adverse employment action.

Respondent's refusal to communicate with Complainant concerning his May 10, 2005 application for a job also did not constitute adverse employment action. Complainant has characterized this refusal to communicate as a refusal to rehire, but Complainant's own account of events make clear that he has not received any rejection of his May 10, 2005 job application. In fact, he has received no response at all to his communication except the referral to Respondent's lawyers he was given on his July 28, 2005 visit. As with Respondent's alleged threat discussed above, this refusal to communicate carries no tangible adverse consequences for Complainant. Therefore, this refusal to communicate cannot be adverse employment action.

Nexus between Protected Activity and Adverse Employment Action

Since Complainant has failed to establish that he has suffered any adverse employment action, he cannot survive this motion for summary decision. Even if Complainant could establish that he suffered adverse employment action, however, he still would not be entitled to relief because he cannot establish any nexus between his alleged protected activity and his alleged adverse employment action. An employer can overcome a Complainant's claims of retaliation, even when an action has tangible adverse employment consequences, by showing that the action in question was taken for legitimate, non-discriminatory reasons. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). Since both alleged adverse employment actions in this case were taken for legitimate, non-discriminatory business reasons, Complainant has failed to establish that any nexus exists.

The allegedly threatening comments contained in Respondent's letter had a legitimate business purpose. Respondent has demonstrated that Complainant was abusing the legal system to engage in harassing behavior. For example, Complainant engaged in abusive and harassing discovery tactics that required repeated judicial intervention, and after having his claims dismissed by the ALJ, Complainant attempted to repackage them as an age discrimination charge before the EEOC. In light of such conduct, Respondent's alleged threat serves the legitimate business purpose of deterring further abusive or harassing tactics in the future.

This conclusion is buttressed by the Secretary's decision in *Hanna*, which supported a respondent's right to protect its reputation through a libel suit. *Hanna*, 1979-TSCA-1, slip op. at 2. Since Complainant has put forth no specific facts to support his bald allegation that this legitimate business purpose was a pretext, Respondent would be entitled to summary decision on this issue even if its letter had carried tangible, adverse job consequences.

Respondent's refusal to communicate with Complainant also had a legitimate business purpose. As Mr. Culvert explained to Complainant on his July 28, 2005 visit, Respondent would communicate with Complainant only through counsel because litigation was pending. It is both common and prudent for opposing parties engaged in litigation to communicate solely through counsel to avoid interfering in any way with the legal action in progress. Complainant's account of Mr. Culvert's comments supports this legitimate business purpose rather than his own case. He was told that Mr. Simone would not meet with him because "[he] filed a lawsuit against the company" and "[he] should contact the company's lawyers." Com. 2nd Am. Compl. at 2. This does not establish any adverse employment action or any pretext for refusing to communicate; rather, it demonstrates that Respondent intended to communicate only through its counsel during the pendency of ongoing litigation. Accordingly, Respondent would be entitled to summary decision on this issue even if its refusal to communicate had carried tangible adverse consequences.

Conclusion

Since 2004, when this controversy with Respondent began, Complainant has filed duplicate suits packaged under unrelated statutes. He has employed abusive discovery tactics and attempted to strong-arm a settlement using thinly-veiled threats of endless litigation. When his tactics finally elicited a warning of a potential civil suit over his "bad faith, frivolous and extortionate litigation," he filed the instant case.

Respondent has met its burden of demonstrating the non-existence of any genuine issues of material fact and establishing its entitlement to judgment as a matter of law. Although Complainant submitted three complaints, two briefs, and an affidavit, he has succeeded only in establishing his own abuse of the judicial system.

Complainant has failed to put forth specific facts that could establish any genuine issue of material fact as to whether or not Complainant suffered any adverse

employment action or whether there was any nexus between such action and Complainant's allegedly protected activity. Thus, Respondent is entitled to judgment as a matter of law.

RECOMMENDED ORDER

It is hereby RECOMMENDED that Summary Decision be GRANTED for Respondent.

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WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).