THOMAS SAPORITO, **ARB No. 05-004**

COMPLAINANT, **ALJ No. 2001-CAA-00013**

v. **DATE: February 28, 2006**

CENTRAL LOCATING SERVICES, LTD and ASPLUNDH TREE EXPERT COMPANY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant,
Thomas Saporito, *pro se, North Palm Beach, Florida*

For the Respondents:
Steven R. Semler, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Washington, D.C.*

FINAL DECISION AND ORDER

Thomas Saporito filed a complaint with the United States Department of Labor alleging that when his employer, Central Locating Service, Ltd. (CLS), demoted and later fired him, it violated the employee protection provisions of six environmental protection statutes.[1] A Department of Labor Administrative Law Judge granted summary judgment

[1] The Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA) (West 2003); the Clean Air Act, 42 U.S.C.A. § 7622(a) (CAA) (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (CERCLA) (West 2005); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (TSCA)

to CLS because Saporito did not show that a genuine issue of fact exists as to whether he engaged in activity that the statutes protect, an essential element of his case. We, too, find that Saporito did not make this showing and therefore affirm summary judgment for CLS.

BACKGROUND

CLS serves utility companies in southern Florida by identifying the location of underground utility lines and marking their positions at ground level so that construction work can be accomplished in the vicinity without interfering with the lines. Sometimes CLS crews must remove manhole covers to carry out this work. Saporito began working for CLS as a general foreman in July 2003.

During the period August 2003 through January 2004, Saporito repeatedly informed CLS managers that he believed company crews were not taking adequate precautions when working in or near manholes. Specifically, Saporito told CLS managers that he thought flammable or combustible gases could have accumulated in three manholes that his crew had opened and if ignited, could have caused air and water pollution in the area.[2] Saporito also told the managers that the company was violating the CAA, TSCA, and the Occupational Safety and Health Act and that therefore he would report it to federal safety agencies. Furthermore, he wrote to CLS managers to object that his supervisors were retaliating against him for having raised the issue of manhole fires and explosions. This retaliation included, among other things, denying him overtime, falsely charging him with recordkeeping errors, and issuing unwarranted written criticisms of his work.

In October 2003, CLS demoted Saporito and reduced his pay, claiming that his work performance was unsatisfactory. On December 14, 2003, and January 5, 2004, Saporito filed whistleblower complaints with the Occupational Safety and Health Administration (OSHA) pursuant to CAA, TSCA, CERCLA, and SWDA.[3] He

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(West 1998); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (FWPPCA) (West 2001); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (SWDA) (West 2001).

[2] Saporito also raised occupational safety and health issues, but our jurisdiction is limited to his environmental pollution concerns. *See Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 01-CAA-4, slip op. 4-5 (ARB July 30, 2004).

[3] The Environmental Protection Agency (EPA) enforces the safety requirements of the CAA, CWA, etc., but the Department of Labor (OSHA) enforces those statutes' whistleblower protections. When OSHA receives an environmental whistleblower complaint, it investigates the merits of the employee's claim and forwards a copy of the complaint to EPA so that EPA may determine whether to investigate the underlying environmental safety issues. *See* OSHA CPL 02-03-002, Whistleblower Investigation

complained that CLS demoted him and otherwise harassed him because of his complaints about possible manhole explosions expelling pollutants into the air or water. On January 8, 2004, CLS fired him, again citing poor work performance. The next day, Saporito amended his whistleblower complaints to include the fact that CLS had fired him.[4]

After investigating, OSHA dismissed Saporito's environmental whistleblower complaints. OSHA determined that CLS would have disciplined and fired Saporito for poor work performance even if he had not told CLS managers that company work practices around manholes could lead to air and water pollution. Saporito invoked his right to a hearing, and the case was assigned to a Labor Department ALJ for adjudication.[5]

CLS moved for summary judgment, arguing that Saporito's concerns that manholes could contain combustible or flammable substances which could be ignited and explode, and thereby expel pollutants into the air or water, were not grounded in reasonably perceived violations of the environmental acts. CLS asserted that Saporito's evidence would not support a finding of a reasonable likelihood that fire or explosion could occur or cause environmental pollution. Therefore, CLS contended, Saporito's oral and written complaints to CLS managers about possible environmental pollution did not constitute protected activity, a necessary element of Saporito's whistleblower complaint.

Saporito countered that his environmental pollution concerns were reasonable. OSHA safety standards and his own experience and training indicated that confined spaces like manholes generally present a fire and explosion risk and that CLS was not taking adequate precautions. Saporito also argued that his threats to CLS that he would report the company for environmental violations constituted protected activity in its own right, independent of his efforts to convince CLS managers they were not taking adequate precautions with manholes.

Manual; Saporito's Opposition to Respondent's Motion for Summary Judgment below at Attachment 14. (Hereafter, we refer to attachments to Saporito's Opposition to Respondent's Motion for Summary Judgment as "Attach.")

[4] Saporito also filed an occupational safety complaint with OSHA in February 2004. He claimed, inter alia, that CLS failed to provide its crews with personal protective equipment such as hardhats and did not comply with OSHA's confined space entry standards when its employees entered manholes. Saporito Deposition Attach. 8, pp. 29 – 32. OSHA corresponded with CLS about these allegations. In February 2004, CLS reported to OSHA that it had committed one violation of OSHA standards but that it had taken action to assure the violation would not recur. CLS also told OSHA that it was operating in compliance with OSHA standards in all other respects and that it had given its employees refresher training on OSHA standards for work in confined spaces. Attach. 13. Based on CLS's response, OSHA concluded that no on-site inspection was necessary and closed the occupational safety case. Attach. 13.

[5] See 29 C.F.R. § 24.4(d)(2) and (3)(2005).

The ALJ recommended that CLS's motion for summary judgment be granted because he found that Saporito did not make a sufficient showing that he engaged in protected activity. The ALJ found that undisputed evidence showed that the likelihood of explosion and pollution was "remote" and "tangential" and therefore could not support a finding that Saporito reasonably perceived environmental violations. Recommended Decision and Order (R. D. & O.) at 10. Saporito petitioned us to review the recommended decision.[6]

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 the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *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, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also governs our review. 29 C.F.R. § 18.40 (2005). The standard for granting summary decision is essentially the same as that found in Fed. R. Civ. P. 56, which governs summary judgment in the federal courts. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 03-SOX-026, slip op. at 3 (ARB Dec. 30, 2005). Thus, summary judgment 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).

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). 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 the nonmoving party. *Moldauer*, slip op. at 4; *Anderson*, 477 U.S. at 248.

The burden falls on the movant to demonstrate an absence of evidence to support the nonmoving party's case. Summary decision is appropriate if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party 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). In considering the motion, we review the evidence in the light most favorable to the nonmovant. *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ Nos. 03-AIR-19, 03-AIR-20, slip op. at 3 (ARB

[6] 29 C.F.R. § 24.8(a).

July 29, 2005); *cf. Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Barfield v. Brierton*, 883 F.2d 923, 933-934 (11th Cir. 1989).

DISCUSSION

A. The Legal Standard

To prevail, Saporito must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer was aware of his protected activity, (3) his employer took adverse action against him, and (4) his protected activity contributed to the employer's decision to take adverse action. *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 5 (ARB Apr. 30, 2004). Failure to prove any one of these elements is fatal to the employee's case. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16 (ARB Feb. 28, 2003). Thus, to defend against CLS's motion for summary judgment, Saporito must set forth specific facts which could support a finding that he engaged in protected activity.

The environmental acts define protected activity as: "commencing a proceeding," "testifying in such a proceeding," "assisting in such a proceeding," or "taking any other action to carry out the purposes" of the environmental acts. 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA); 42 U.S.C.A. § 7622(a) (CAA); 42 U.S.C.A. § 9610(a) (CERCLA); 15 U.S.C.A. § 2622(a) (TSCA); 33 U.S.C.A. § 1367(a) (FWPPCA); 42 U.S.C.A. § 6971(a) (SWDA).[7]

Saporito argues that he engaged in three protected activities: (1) complaining to his supervisors and managers about fire and explosion hazards in and around manholes that could pollute the air and water; (2) telling managers that his supervisors wrongfully denied him overtime, charged him with recordkeeping errors, and issued unwarranted criticisms because he had complained about environmental pollution risks; and (3) threatening CLS that he would report the company to federal agencies for creating environmental hazards and for retaliating against him.

B. Did Saporito sufficiently demonstrate protected activity?

1. Fear of environmental pollution due to fire and explosion.

When an employee makes a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts, he or she engages in protected activity. *See e.g., Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 2 (ARB Apr. 8, 1997); *cf. Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931-932 (11th Cir. 1995)

[7] The text varies slightly among the six statutes, but the variations are irrelevant to this case.

(applying "reasonably perceived" test to analogous Energy Reorganization Act, 42 U.S.C.A. § 5851).

The employee need not prove that the hazards he perceived actually violated the environmental acts. *Minard v. Nerco Delamar Co.*, No. 92-SWD-1 (Sec'y Jan. 25, 1994) (available at www.oalj.dol.gov); *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2, slip op. at 25-26 (Sec'y Aug. 17, 1993); *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Nor must he prove that his assessment of the hazard was correct. *Cf. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (protecting employee warnings even when the employee is mistaken encourages resolution of the dispute without litigation and affords management the opportunity to justify or clarify its policies to the employee). And it is not necessary that the condition have already resulted in a safety breakdown. *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at 8 (ARB Sept. 29, 2004) ("High's expression of concern did not have to be borne out later in catastrophe to have protected status.").

On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected. *Kesterson*, slip op. at 2; *Gain v. Las Vegas Metro. Police Dep't.*, ARB No. 03-108, ALJ No. 02-SWD-4, slip op. at 3 n.3 (ARB June 30, 2004). Nor is a complaint that is based on numerous assumptions and speculation reasonably grounded in perceived violations. *Crosby*, slip op. at 27-28.

Therefore, since this case comes to us on a summary judgment, our task is to determine whether Saporito has presented sufficient evidence to raise a genuine issue of fact that he reasonably perceived that fires or explosions in or around the manholes could pollute the air or water.

The following facts are uncontested. Saporito complained both orally and in writing to CLS supervisors and managers that locating crews failed to test for combustible, explosive or toxic substances in the three manholes in question. Specifically, Saporito told CLS that its crews created environmental pollution hazards by failing to test the air above manhole covers for explosive and flammable gases before removing the covers, by not using special spark-resistant tools to lift the covers off, and for failing to test the air inside the open manholes for explosive and flammable gases. He also complained that CLS was wrong to permit ignition sources such as a running truck engine or a lit cigar near the open manholes. In addition, he expressed concern that CLS could be violating environmental laws by expelling liquid from manholes without first establishing that the liquid did not contain pollutants that could contaminate ground water. C. Initial Br. at 9; R Reply Br. at 1-2, 3 n. 2, 11-12.[8]

[8] "C. Initial Br." means Complainant's Initial Brief. "R. Reply Br." means Respondent's Reply Brief.

In support of its motion for summary judgment, CLS submitted the affidavit of a safety specialist who opined that the likelihood for a fire or explosion was "extremely remote or non-existent" because "too many speculative contingencies," such as the correct ratio of oxygen and gas, would have to coincide. Noland Affidavit at 4, attached to Respondent's Motion for Summary Judgment. CLS also points out that Saporito does not claim that the three manholes actually contained any toxic, flammable or combustible substances or that CLS had ever experienced any of the polluting events that Saporito hypothesized. Furthermore, CLS attaches great significance to the fact that though OSHA has issued safety standards to protect workers who enter confined spaces, EPA does not require any of the protections that Saporito promotes. On this basis, CLS argues that Saporito's environmental concerns are purely speculative and not grounded in reasonably perceived violations of the environmental statutes.

Though he did not know if the manholes actually contained gas or other pollutants, Saporito testified that he believed that gas can migrate into manholes underground from as far away as 40 to 60 feet. Furthermore, he testified that one of the manholes was near a gas station. Moreover, he said that vegetative matter can find its way into manholes, decay, and then generate ignitable mangrove gas. Saporito Affidavit, Attach. 9; Saporito Deposition, Attach. 8. He also testified, however, that explosion and fire cannot occur unless oxygen and gas are present in specific ratios and that he did not know what those ratios are. Saporito Deposition, Attach. 8.

Even so, and even if CLS did not actually violate the environmental statutes, or even if he was mistaken in believing that CLS was violating the statutes, Saporito argues that his concerns about air and water pollution were nevertheless reasonable. To support this position, Saporito supplemented his opposition to summary judgment with excerpts from CLS's safety manual. Attach. 10. The safety manual states that manholes "may have flammable/combustible/explosive atmospheres present . . . or toxic atmospheres present . . . ." Attach. 10 p. 37. "Any space, above or below ground, with poor natural ventilation should be treated as a confined space and considered potentially dangerous." *Id.* The manual lists explosion as one of the dangers associated with confined spaces. *Id.* at 38. "Although rare, fire and explosion are possible even when opening a manhole. Fire and/or explosion can come from gasoline, chemicals, paint, solvents, methane, or hydrogen sulfide." *Id.* at 39.

Moreover, Saporito asserts that his concerns about environmental pollution were reasonable because OSHA safety standards contain extensive safety requirements when workers enter confined work spaces such as manholes, and specifically refer to fire and explosion hazards. Attach. 7, 8, 9; *see e.g.*, 29 C.F.R. §§ 1910.146; 1926.956(a)(3).

And in his affidavit supporting his opposition to summary decision, Saporito emphasized that his experience and training related to explosion and fire hazards associated with manholes provided a basis for his concerns:

> I have an Associates Degree in Electronics Technology and have years of solid work experience working in and around

> confined work spaces such as manholes. My education in electricity and in electronics and my work experience related to confined work spaces and explosive gases and fumes, along with my extensive safety training in the explosive dangers associated with making confined work space entrances, including entrances into manholes, has instilled in my mind that the instances involving manhole work as described . . . during my employment at CLS, involved work practices in which a violent explosion of highly explosive gases or fumes, would have violated environmental statutes which prohibit the release of pollutants into the ambient air and which prohibit the release of pollutants into the ground water system.

Attach. 9, p. 5.

For purposes of this motion, we view this evidence in the light most favorable to Saporito. We take into account Saporito's training and experience, as well as the difficulty of the subject matter. We accept Saporito's testimony that previous employers taught him that manholes are potentially explosive and that CLS and OSHA safety rules confirm that danger. Therefore, we find that Saporito had a reasonable basis to believe that potentially explosive gases or other pollutants could accumulate in the manholes.

Nonetheless, Saporito's argument fails because the record contains no evidence that if fire, explosion, or contamination occurred, air or water would be polluted. Saporito assumes that, regardless of circumstances, fires and explosions cause air pollution and that contaminated water on the earth's surface causes ground water pollution. Saporito's mere belief, without some supporting evidence, that the air and water could become polluted because of the gas or pollutants in or near the manholes involved is not a reasonable perception that CLS violated the environmental statutes. Saporito's belief is only speculation. Therefore, his complaints based on this belief are not protected activity. *Crosby*, slip op. at 27-28. *See also Kesterson*, slip op. at 2 (the Clean Air Act does "not protect any employee simply because he subjectively" thinks the complained of conduct might affect the environment); *Crosier v. Westinghouse Hanford Co.*, No. 92-CAA-3, slip op. at 23 (Sec'y Jan. 12, 1994) (Clean Air Act complaint not protected because "no allegation or evidence that [the complained of conditions] might cause deterioration in air quality"); *High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, ALJ No. 96-CAA-8, slip op. at 5 (ARB Mar. 13, 2001) (complaint that physically unfit plant guards could result in environmental violations was "rank speculation" where complainant reasoned (1) unfit guards would be unable to deter theft of nuclear material, (2) stolen nuclear material could be used to make a bomb, (3) bomb could be detonated in this country, and (4) resulting explosion would be harmful to the environment).

2. Complaining about being harassed.

Saporito argues that he engaged in a second form of protected activity when he objected orally and in writing to CLS managers that his supervisors were, among other things, denying him overtime and criticizing his work in retaliation for voicing his concerns about the potential for manhole fires and explosions. C. Initial Br. at 26. Complaining to the employer about being retaliated against for raising safety issues can be protected activity. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14, -18, -19, -20, -21, -22, slip op. at 24-25 (ARB Nov. 13, 2002).

But though the record contains copies of letters to CLS and his testimony showing that he accused CLS of retaliating against him, Attach. 2-5, Saporito did not present this argument to the ALJ when opposing CLS's motion for summary judgment. In fact, until he presented this argument to us, none of Saporito's pleadings alleged this form of protected activity. Furthermore, this argument appears to be only an after-thought and is not supported by references to the record, legal authority, or analysis. *See* C. Initial Br. at 26, para. 7.

We generally treat such bald arguments as waived. *See Hall v. United States Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-00005, slip op. at 6 (ARB Dec. 30, 2004). And we ordinarily do not consider arguments that are first raised on appeal, even when reviewing a summary decision de novo. *See e.g., Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-17, slip op. at 3 (ARB Dec. 29, 2005). *But compare Ochran v. United States*, 117 F.3d 495, 503 (11th Cir. 1997) ("With issues subject to *de novo* review on appeal, our scope of review is at its broadest and our willingness to decide without the benefit of a district court ruling should increase commensurately."). Therefore, we will not consider Saporito's argument that his oral and written complaints to CLS management about his supervisors' retaliation constitute protected activity.

3. Threatening to report CLS to federal agencies.

In his whistleblower complaints filed with OSHA and in the amended complaint filed with the ALJ, Saporito specifically asserted that he engaged in protected activity by warning CLS that if it did not test for gases and make him whole for his losses due to demotion, he would report the company to appropriate federal agencies for committing environmental violations and retaliating against him. "The claimant also engaged in protected activity in threatening respondents with an OSHA investigation of claimant's environmental safety concerns and claimant's harassment and discrimination complaints." Complaint (Dec. 15, 2003). Saporito argued the point in his opposition to CLS's Motion for Summary Judgment. "[T]his Court must find that Saporito's written expression to Respondent's managers and officers of his intent to file a complaint with OSHA constitutes protected activity as a matter of law." Answer to Respondent's Reply Brief to Complainant's Opposition to Motion for Summary Judgment, at p. 14, citing *Macktal v. United States Dep't of Labor*, 171 F.3d 323, 329 (5th Cir. 1999) ("A written expression of intent to file a complaint with the NRC falls squarely within [the statutory

phrase] 'is about to commence or cause to be commenced' a proceeding under the ERA."). The ALJ did not address this issue. On appeal, Saporito renews his argument that his warnings to CLS that he would file environmental safety complaints with federal authorities constituted protected activity. C. Initial Br. at 8, 9, 10, 11, 12, 26.

Threatening to report violations of the environmental acts to federal agencies can be protected activity. *Dodd v. Polysar Latex*, No. 88-SWD-4, slip op. at 13 (Sec'y Sept. 22, 1994); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1988); *Macktal*, 171 F.3d at 329. But in order to be protected, such a threat, like a complaint, must be based on a reasonable perception that the employer has violated, or is about to violate, the environmental statutes. To hold otherwise would be to encourage whistleblower litigation that would not serve the legislative goal of protecting the environment. Thus, "[i]t is well settled that protected activities under the environmental whistleblower provisions are limited to those which are grounded in conditions constituting reasonably perceived violations of the environmental statutes." *High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, slip op. at 4-5. Therefore, since we have already found that Saporito did not present sufficient evidence that he reasonably believed that CLS violated the environmental statutes, his threat to report CLS for violating the statutes is not protected.

C. Discovery

Saporito argues, for the first time on review, that the ALJ erred because he granted summary judgment prematurely. In opposing summary judgment below, Saporito did not argue that summary judgment was premature because discovery was incomplete.

As discussed above, we do not consider arguments first raised on appeal, even when reviewing a summary decision de novo. In any event, Saporito's argument lacks merit. An ALJ's limitation on the scope of discovery lies within his or her sound discretion. *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 96-CAA-9, slip op. at 4 (ARB Sept. 29, 2004). 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). Here, Saporito merely asserts he should have been permitted to complete discovery on *all* issues before the ALJ ruled on CLS's motion. He identifies no link between his discovery requests and the sole issue of whether he engaged in protected activity.[9] Accordingly, the ALJ did not abuse his discretion.

[9] Throughout his initial brief Saporito contends that he should have been permitted to cross examine CLS's witnesses and put on his own witness. But this, of course, is precisely what summary disposition is meant to avoid – a full blown trial when the pleadings and discovery show that the plaintiff will not be able to prevail as a matter of law.

CONCLUSION

Saporito did not present sufficient evidence to raise a genuine issue of fact that he reasonably perceived that fires or explosions in or around the three manholes could pollute the air or water. Therefore, his complaint to supervisors and managers about CLS policy and practice when its employees worked in and around manholes and his threat to report CLS to federal agencies because of this policy and practice are not protected acts. Saporito's remaining theory of protected activity – that he objected to CLS managers that his supervisors retaliated because he raised concerns about the manhole policy and practice – fails because Saporito did not support it with any authority or analysis and only raised it on appeal. Moreover, the ALJ did not abuse his discretion in limiting discovery to the issue of protected activity. Thus, since Saporito did not raise a genuine issue of fact that he engaged in protected activity, a necessary element of his case, we must grant CLS's motion for summary decision and **DENY** the complaint.[10]

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[10] In light of our disposition of the case, we deny Respondents' October 14, 2004 Motion to Dismiss as moot.