



In the Matter of:

MARY ANN ELLIS,

ARB CASE NO. 2021-0005

COMPLAINANT,

ALJ CASE NO. 2019-FDA-00006

v.

DATE: July 19, 2021

GOODHEART SPECIALTY MEATS,

RESPONDENT.

Appearances:

For the Complainant:

Mary Ann Ellis; *pro se*; San Antonio, Texas

For the Respondent:

**Frank Davis, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*;
Dallas, Texas**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas
H. Burrell and Stephen M. Godek, *Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. Mary Ellis (Complainant) filed a complaint under the Food Safety Modernization Act (FSMA),¹ and its implementing regulations at 29 C.F.R. § 1987, alleging that her former employer, Goodheart Specialty Meats (Respondent or Goodheart), violated the FSMA's employee protection provisions by terminating her employment due to her complaints about Respondent's chicken product. On

¹ 21 U.S.C. § 399d (2016).

September 3, 2020, the Administrative Law Judge (ALJ) issued an Order Granting Respondent's Motion for Summary Decision. Subsequently, on September 17, 2020, the ALJ issued an Amended Order Granting Respondent's Motion for Summary Decision (Amended D. & O.).² We affirm the Amended D. & O.

BACKGROUND AND PROCEDURAL HISTORY

Complainant worked for Respondent from January 6, 2017, through March 6, 2018, when Respondent terminated Complainant's employment.

On September 4, 2018, Ellis filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Goodheart discharged her for complaints about the safe handling of Goodheart's food product.³ On December 18, 2018, OSHA dismissed the whistleblower complaint. Complainant objected to OSHA's findings and requested a hearing.

On March 25, 2019, Complainant filed a formal complaint in the matter, which the ALJ dismissed on January 6, 2020, for failure to allege protected activities under the FSMA.⁴ On January 31, 2020, Ellis filed an Amended Complaint, in which she alleged that on July 6, 2017, she observed that chicken in production smelled bad and she reported it to a supervisor (among her other concerns about the chicken's quality).⁵

On August 19, 2020, Respondent filed a Motion for Summary Decision. On September 3, 2020, the ALJ issued a D. & O., granting Respondent's Motion for Summary Decision because Complainant could not establish essential elements of her retaliation claim under the FSMA. Subsequently, Complainant filed several Motions for Reconsideration, and the ALJ issued corresponding orders denying the Motions for Reconsideration. In addition, on September 17, 2020, the ALJ issued an Amended D. & O., because the original D. & O. had inadvertently omitted a Notice of Appeal Rights.

² The D. & O. and Amended D. & O. are virtually the same, except the Amended D. & O. includes a Notice of Appeal Rights.

³ Amended D. & O. at 6.

⁴ *Id.* at 2.

⁵ *Id.*

On October 21, 2020, Complainant filed a Petition for Review with the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue agency decisions in FSMA cases.⁶ We review a summary decision de novo, i.e., under the same standard employed by the administrative law judge.⁷ Recognizing that we must be impartial and refrain from advocating “for a pro se complainant, we are equally mindful of our obligation to ‘construe complaints and papers filed by pro se complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.’”⁸

DISCUSSION

On appeal, Complainant objects to the ALJ’s dismissal of her case without a hearing, and contends that the dismissal prevented her from presenting her evidence at a hearing. In response, Goodheart argues that (1) Complainant’s appeal to the ARB was untimely; and (2) the ARB should dismiss Complainant’s appeal because it is without merit. We decline to address whether Complainant timely filed her appeal because, even if Complainant timely filed her appeal, we conclude that her appeal is without merit. In particular, Complainant’s appeal does not clearly identify objections to the ALJ’s conclusions in the Amended D. & O. Moreover, Complainant fails to cite to evidence establishing a genuine issue of material fact for any elements of a FSMA claim. Therefore, we affirm the ALJ’s dismissal.

To prevail on her FSMA retaliation claim, Complainant must demonstrate by a preponderance of the evidence that (1) she engaged in protected activity, (2) the employer took some adverse action against her, and (3) that her protected activity was a “contributing factor” in the adverse action.⁹

⁶ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

⁷ *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. 3 (ARB Jan. 16, 2020).

⁸ *Id.* (citations omitted).

⁹ 21 U.S.C. § 399d; 29 C.F.R. § 1987.109.

Summary decision is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law.”¹⁰ A genuine issue of material fact is one, the resolution of which, could establish an element of a claim or defense and, therefore, affect the outcome of the action.¹¹ When reviewing an ALJ’s summary decision, we view the allegations and evidentiary submissions in the light most favorable to the nonmoving party.¹² If the pleadings and documents submitted by the parties demonstrate the existence of a genuine issue of material fact, then summary decision cannot be granted.¹³

On appeal, Complainant has not legally challenged any aspect or conclusion of the ALJ’s Amended D. & O. Instead, Complainant predominately focuses on unsupported allegations of malfeasance, many of which are not relevant to the underlying whistleblower statutory authority. Under 29 C.F.R. § 1987.110, a petition for the Board’s review should identify “the legal conclusions or orders to which they object, or the objections may be deemed waived.” We also note that “[d]espite the fact that [pro se] filings are construed liberally, the Board must be able to discern cogent arguments” on appeal.¹⁴ Here, Complainant has not met the requirement to raise identifiable objections. Thus, Complainant’s alleged errors are deemed waived.¹⁵

¹⁰ 29 C.F.R. § 18.72.

¹¹ *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 2007-0013, ALJ No. 2005-STA-00050, slip op. at 2 (ARB Oct. 31, 2008) (citations and inner quotations omitted).

¹² *Hukman*, ARB No. 2018-0048, slip op. at 5.

¹³ *Id.*

¹⁴ *See Hasan v. Sargent & Lundy*, ARB No. 2005-0099, ALJ No. 2002-ERA-00032, slip op. at 8 (ARB Aug. 31, 2007) (citations omitted).

¹⁵ *See Dev. Res., Inc.*, ARB No. 2002-0046, slip op. at 4 (ARB Apr. 11, 2002) (citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a “settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”) (citation omitted)); *see also U.S. v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) (“[I]t is not our function to craft an appellant’s arguments.”) (citation omitted); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (stating “[a] skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim [for appellate review] . . . Judges are not like pigs, hunting for truffles buried in briefs.”) (citations omitted).

Moreover, Complainant has not set forth any facts or cited to materials in the record to raise a genuine issue of material fact as to any of the elements of a successful FSMA claim. To survive a summary decision motion, Complainant “may not rest upon mere allegations or denials of such pleading.”¹⁶ Instead, Complainant must support her assertions by either “citing to particular parts of materials in the record,” or “showing that materials cited by an adverse party do not establish the presence or absence of a genuine dispute.”¹⁷ Complainant has not pointed to evidence in the record that establishes a genuine issue of material fact. Moreover, Complainant has not shown that Respondent’s evidence fails to establish the absence of a genuine issue of material fact. Therefore, Complainant has not presented a sufficient basis for reversal of the ALJ’s Amended D. & O.

Complainant also alleges that she can produce evidence in support of her case at a future hearing, but Complainant cannot overcome a motion for summary decision by generally claiming that future evidence will support her claim.¹⁸

On appeal, Complainant has not provided any grounds for the Board to upset the ALJ’s Amended D. & O. As a result, upon consideration of the parties’ briefs on appeal, and having reviewed the evidentiary record as a whole, we affirm the ALJ’s Amended D. & O.

CONCLUSION

For the foregoing reasons, the Complainant’s Petition for Review is **DISMISSED** and the ALJ’s Amended D. & O. is **AFFIRMED**.

SO ORDERED.

¹⁶ *Hernandez v. Metro North Commuter R.R. Co., Inc.*, ARB No. 2017-0016, ALJ No. 2016-FRS-00023, slip op. at 5 (ARB Mar. 1, 2019) (*quoting Menefee v. Tandem Transp. Corp.*, ARB No. 2009-0046, ALJ No. 2008-STA-00055, slip op. at 4 (ARB Apr. 30, 2010)).

¹⁷ 29 C.F.R. § 18.72.

¹⁸ *See Hernandez*, ARB No. 2017-0016, slip op. at 5-6 (“While Complainant speculates that he would be able to elicit additional facts in discovery or at a hearing, he must point to facts that he hopes to elicit in the face of Respondent’s evidence showing its policy on the matter or show that Respondent’s submissions do not establish the absence of a genuine issue of material fact.”). *See also Paulson, Inc. v. Bromar, Inc.*, 775 F.Supp. 1329, 1332 (D. Haw. 1991) (“The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant’s evidence at trial.”).