U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

CHLORIS HALL,	**ARB CASE NO. 2022-0003**
COMPLAINANT,	**ALJ CASE NO. 2020-FDA-00007**
v.	**DATE: March 15, 2022**

CVS HEALTH, CVS HEALTH CORPORATION, CAREMARK, L.L.C., and CVS PHARMACY, INC.,

RESPONDENTS.

Appearances:

For the Complainant:
Chloris Hall; *pro se*; Chicago, Illinois

For the Respondent:
James L. Curtis, Esq. and Matthew A. Sloan, Esq.; *Seyfarth Shaw LLP*; Chicago, Illinois

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

DECISION AND ORDER

PER CURIAM. Chloris Hall (Complainant) filed a complaint under the Food Safety Modernization Act[1] (FSMA or Act), and its implementing regulations at 29 C.F.R. § 1987, alleging that her former employer, Caremark, L.L.C., unlawfully

[1] 21 U.S.C. § 399d (2016).

terminated her employment under the FSMA's employee protection provision.[2] On September 29, 2021, an Administrative Law Judge (ALJ) issued a Decision and Order Granting Summary Decision (D. & O.). We affirm.

The Secretary of Labor has delegated his authority to the Administrative Review Board (Board) to issue final agency decisions in FSMA cases.[3] The Board reviews ALJ orders granting summary decision de novo.[4]

The FSMA's employee protection provision provides that "[n]o entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee" because the employee engaged in an activity protected by the FSMA.[5] To successfully prove a retaliation claim under the FSMA, the complainant must demonstrate, by a preponderance of the evidence, that: (1) they engaged in activity protected under the FSMA; (2) they suffered an adverse personnel action; and (3) their protected activity was a contributing factor in the adverse action alleged in the complaint.[6]

Complainant contests the ALJ's decision to grant summary decision for the Respondents. In his decision, the ALJ concluded there was no genuine issue of material fact that: (1) CVS Health, Caremark, L.L.C., and CVS Health Corporation are not employers covered under the FSMA's employee protection provision; and (2) Complainant's alleged protected activity was not a contributing factor in the adverse employment action CVS Pharmacy Inc. (CVS Pharmacy) took against her.

An ALJ may grant summary decision "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."[7] The moving party has the burden to show that the non-moving party cannot make a showing sufficient to establish an essential element of the

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[2] Caremark, L.L.C. employed Complainant as a "Pharmacy Technician – Sterile Compounding" at the Company's specialty pharmacy location in Mt. Prospect, Illinois from December 3, 2018, until Caremark, L.L.C. terminated her employment on January 26, 2019. D. & O. at 5-6.

[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[4] *Ellis v. Goodheart Specialty Meats*, ARB No. 2021-0005, ALJ No. 2019-FDA-00006, slip op. at 3 (ARB July 19, 2021).

[5] 21 U.S.C. § 399d(a).

[6] *Ellis*, ARB No. 2021-0005, slip op. at 3; 29 C.F.R. § 1987.109(a) (2016). If the complainant satisfies their burden, the respondent will avoid liability if it proves, by clear and convincing evidence, that it would have taken the same adverse action absent the complainant's protected activity. 29 C.F.R. § 1987.109(b).

[7] *Ellis*, ARB No. 2021-0005, slip op. at 4.

case.[8] The non-moving party must rebut the movant's motion and evidence with contrary evidence sufficient to create a genuine issue of material fact to avoid summary decision.[9] The non-moving party must present specific facts that could support a finding in their favor and may not rely on conclusory allegations.[10] The Board views the allegations and evidentiary submissions in the light most favorable to the non-moving party.[11]

The obligation to protect whistleblowers under the employee protection provisions of the FSMA applies only to certain employees and covered entities. As relevant to Complainant's retaliation claim in this case, Complainant bears the burden of first establishing that Respondents are covered entities under the FSMA.[12] The ALJ concluded that CVS Health, Caremark, L.L.C., and CVS Health Corporation were not entities engaged in food-related activity and that CVS Pharmacy was the only remaining Respondent.[13] Among other requirements not applicable here, on summary decision, Complainant must also adduce sufficient evidence to create a genuine issue of material fact that Respondent had knowledge or suspected knowledge about Complainant's alleged protected activity.[14] However, if the undisputed evidence shows that CVS Pharmacy did not know about the protected activity, that activity could not have played a role in the adverse action.[15]

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[8] *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *see also Jones v. Williams*, 791 F.3d 1023, 1030-31 (9th Cir. 2015) (quotation omitted) ("In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.").

[9] *Nortell v. N. Cent. Coll.*, ARB No. 2016-0071, ALJ No. 2016-SOX-00013, slip op. at 3 (ARB Feb. 12, 2018).

[10] *Id.*; *Latigo v. ENI Trading & Shipping*, ARB No. 2016-0076, ALJ No. 2015-SOX-00031, slip op. at 3 (ARB Mar. 8, 2018).

[11] *Ellis*, ARB No. 2021-0005, slip op. at 4.

[12] Covered employers include entities "engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." 29 C.F.R. § 1987.101(d) (2016).

[13] D. & O. at 14.

[14] 29 C.F.R. § 1987.104(e)(3); *Cottier v. Bayou Concrete Pumping, LLC*, ARB No. 2020-0069, ALJ No. 2019-STA-00046, slip op. at 13-17 (ARB Jan. 18, 2022).

[15] Prior knowledge about protected activity is essential to the causation element. *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 14 n.84 (ARB Oct. 5, 2020); *see also Folger v. SimplexGrinnell LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. at 2 n.3 (ARB Feb. 18, 2016).

Upon review of the ALJ's D. & O., the record, and the parties' briefs, we conclude that the ALJ's decision is a logical, well-reasoned ruling based on undisputed evidence and the applicable law. First, Respondents submitted evidence that CVS Health, Caremark, L.L.C., and CVS Health Corporation are not covered entities because none of them engaged in any of the listed food-related activities that come within the scope of the Act. Complainant failed to produce any evidence to rebut Respondents' evidence. Thus, we agree with the ALJ's conclusion that summary decision is proper for each of these Respondents.[16]

In contrast, the ALJ stated that: "Arguably, Complainant was an 'employee' of CVS Pharmacy, Inc. within the meaning of the Act because she was 'an individual whose employment could be affected by a covered entity.'"[17] The ALJ further noted that CVS Pharmacy did not dispute Complainant could show evidence that it engaged in at least one of the food-related activities within the scope of FSMA and, therefore, was a covered entity.[18]

The ALJ also found that CVS Pharmacy did not dispute that Complainant could show evidence of a protected activity or that the advice CVS Pharmacy's Human Resources Advisor provided to Caremark, L.L.C. in support of Complaint's employment termination "was adverse to Complainant."[19] Instead, CVS Pharmacy argues that it had no knowledge of Complainant's alleged protected activity and, therefore, the alleged protected activity was not a contributing factor to her discharge as a matter of law.[20] In support of its argument, CVS Pharmacy offered undisputed evidence indicating that CVS Pharmacy did not know about Complainant's alleged protected activity at the time. The ALJ determined the only person related to CVS Pharmacy who arguably affected Complainant's employment was a Human Resources Advisor at CVS Pharmacy, who was involved in the decision to discharge Complainant.[21] This person stated in a declaration that she had not read or heard anything about alleged protected activities prior to the decision to discharge Complainant.[22]

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16 D. & O. at 7 (citing 29 C.F.R. § 18.10(a)).

17 *Id*. at 8 (citing 20 C.F.R. § 1987.101(e)). Caremark, L.L.C. is owned by Caremark Rx., L.L.C. (a Delaware limited liability company), which is owned by CVS Pharmacy, Inc. (a Rhode Island corporation), which is owned by CVS Health Corporation. *Id.* at 5 n.11.

18 *Id*. at 8.

19 *Id*. at 6, 8. It is unclear what Complainant alleges was her protected activity. The ALJ seems to indicate it was reporting harassment and violations of the FSMA to her supervisor.

20 *Id*. at 3-4, 8.

21 *Id*. at 8.

22 *Id*. at 6, 8. CVS Pharmacy's Human Resources Advisor reviewed the documentation in Complainant's personnel file and discussed Complainant's poor work performance and

Complainant failed to produce any evidence to rebut Respondent's evidence that CVS Pharmacy had no knowledge of Complainant's alleged protected activities. The ALJ observed that Complainant's brief made no specific citation to evidence on the record demonstrating that CVS Pharmacy had knowledge of Complainant's alleged protected activity.[23] Instead, Complainant presented only conclusory allegations to support her claim that CVS Pharmacy was aware of her alleged protected activity before her discharge.[24] Complainant attached two memoranda in her briefs to the ALJ.[25] The ALJ determined there was no information in these memoranda that would have provided CVS Pharmacy's Human Resources Advisor with knowledge that Complainant had engaged in protected activity within the scope of the FSMA.[26] Thus, the ALJ determined there were no facts in the record that would allow a finding of contributing factor causation against CVS Pharmacy.[27]

We agree with the ALJ's determination that there no was no genuine issue of material fact. Complainant could not establish that her protected activity was a contributing factor in the termination of her employment as a matter of law. Complainant did not produce any evidence that countered CVS Pharmacy's proffer of evidence that it had no knowledge or suspected knowledge about Complainant's alleged protected activity prior to her discharge, which is essential for a finding of contributing factor causation.[28] We, therefore, conclude that the ALJ properly granted summary decision and dismissed the complaint.

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conduct towards co-workers with Complainant's supervisor and with the local human resources advisor, who had previously concluded that termination of Complainant's employment appeared to be the appropriate action. *Id.* CVS Pharmacy's Human Resource Advisor agreed that Complainant's conduct was a sufficient basis to terminate her employment. *Id*. After receiving this advice, Caremark, L.L.C. terminated her employment on January 26, 2019. *Id.* at 6.

[23] *Id.* at 11.

[24] *See Siemaszko v. First Energy Nuclear Operating Co. Inc.*, ARB No. 2009-0123, ALJ No. 2003-ERA-00013, slip. op. at 3 (ARB Feb. 29, 2012) (citations omitted) ("When the moving party focuses its motion on the complainant's ability to prove each element of his claim, it may prevail by pointing to the absence of evidence needed for one or more elements.").

[25] D. & O. at 12.

[26] *Id*. at 12-13.

[27] *Id*. at 15. *See Leiva v. Union Pac. R.R. Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036, slip op. at 6 n.12 (ARB May 17, 2019) ("[W]ith a 'no knowledge' finding, there can be no legally sufficient causation.").

[28] While a complainant can establish either knowledge or suspected knowledge by direct or circumstantial evidence, Complainant has not done so here, where she has failed to put forth anything to negate Respondent's showing on summary decision that there was no knowledge during the decision-making. *See Kossen v. Asia Pac. Airlines*, ARB No. 2021-

Accordingly, we summarily **AFFIRM** the ALJ's Decision and Order Denying Complaint.

SO ORDERED.

0012, ALJ No. 2019-AIR-00011 (ARB Aug. 26, 2021) (stating in adopted and attached ALJ Decision and Order at 23, that "knowledge of a protected activity may be shown by circumstantial evidence"). She has therefore failed "to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity," as required for her prima facie case. *See* 29 C.F.R. § 1987.104(e)(3).