

In the Matter of:

LAVERNE B. KELLY-LUSK,

ARB CASE NO. 16-041

COMPLAINANT,

ALJ CASE NO. 2014-TSC-003

v.

DATE: September 18, 2017

DELTA AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq.; Kalijarvi, Chuzi, Newman & Fitch, P.C.; Washington, District of Columbia

For the Respondent:

Benjamin A. Stone, Esq.; Munger & Stone, LLP; Atlanta, Georgia

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Tanya L. Goldman; Administrative Appeals Judge

FINAL DECISION AND ORDER

Complainant La Verne Lusk filed a whistleblower complaint¹ alleging that her former employer, Respondent Delta Airlines, retaliated against her for engaging in protected activity by

¹ Lusk originally filed her whistleblower complaint under both the Toxic Substances Control Act of 1986, 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (TSCA), and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR-21). The ALJ dismissed Lusk's entire AIR-21 complaint and all adverse actions under TSCA, except for the delayed issuance of the retirement plan checks. *Kelly-Lusk v. Delta Airlines, Inc.*, ALJ Nos. 2014-AIR-004, 2014-TSC-003 (Apr. 15, 2014). Complainant has not appealed the ALJ's dismissal of the AIR-21 complaint or of the adverse actions, other than the delayed issuance of the retirement checks.

causing two retirement benefits checks to be delayed. A Department of Labor Administrative Law Judge found that Lusk failed to raise a genuine issue of material fact regarding whether the alleged protected activity in which she engaged on August 17, 1987, contributed to the delays she experienced in September and October 2013, in receiving her retirement checks from Xerox Corporation, which processed Respondent's retirement benefits. Accordingly, the ALJ granted Delta's Motion for Summary Decision.² For the following reasons, we affirm.

BACKGROUND

Delta Airlines hired Laverne Lusk as a flight attendant in 1973.³ On August 17, 1987, while preparing for a flight, the airplane's captain gave her a packet of iced tea mix, pointed to a gallon jug in the galley, and asked her to make him a glass of iced tea.⁴ She made the tea, tasted it, and concluded that it tasted funny.⁵ Her co-worker also tasted it.⁶ Both women felt ill.⁷ Lusk and her co-worker turned the bottle and found a label that said, "Contains methanol cannot be made non-poisonous."⁸ Lusk and her co-worker were transported by ambulance to an emergency room and treated.⁹

Lusk testified that she spoke to two Delta supervisors, Ellen Ahmann and Yvonne Johnson, about the incident on the day she drank the methanol.¹⁰ Lusk averred that another supervisor, Patty Raso was reluctant to provide her with a sample of the methanol to provide to her doctor.¹¹ She also asked for a copy of the material safety data sheet and OSHA HazMat safety information. Lusk was told that the bottle was inadvertently crushed in the mailroom, but she was provided with a sample.¹² Lusk testified that she could remember only three other

² *Kelly-Lusk v. Delta Air lines, Inc.*, ALJ No. 2014-TSC-003, slip op. at 9 (Feb. 17, 2016)(Order on Respondent's Motion for Summary Decision (Sum. Dec. Ord.)).

³ Deposition of Laverne Barksdale Kelly-Lusk at 38.

⁴ *Id.* at 45-47.

⁵ *Id.* at 50.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 51.

⁹ *Id.* at 52-55.

¹⁰ *Id.* at 61.

¹¹ *Id.* at 62-63.

¹² *Id.* at 64.

conversations with Delta employees in the late 1980's or early 1990's that related in any way to methanol: 1) she spoke to pilot Bob Byrd, who, in the late 1980's or early 1990's, told her that he had seen another bottle of methanol on an aircraft, 2) Byrd and some vice-presidents, whose names she did not recall, called her in 1989 or 1990 to tell her that they were sorry for what had happened to her, and 3) sometime before 1993, she called Jenny Poole, vice-president of in-flight service, and indicated that Delta had mishandled the incident because they did not bring it to Poole's attention.¹³ Lusk testified that she does not know of anyone else at Delta who knew of the methanol incident.¹⁴

Lusk returned to work until 1993, when Delta terminated her employment, stating that she no longer met its standards.¹⁵ Lusk stated to the Georgia Department of Labor that Delta fired her for falsification of a document, which she disputed.¹⁶ When Lusk left Delta she was a vested participant in a retirement pension plan, the Delta Family-Care Retirement Plan.¹⁷ Delta Plan rules govern eligible participants, eligible benefits earned, and the conditions under which they are paid.¹⁸ Xerox Business Services, LLC provides certain administrative services to the Plan, "including processing the payment of retirement benefits to eligible Plan participants and the handling of returned checks."¹⁹ Xerox issues and sends the benefits checks through a standard automated process.²⁰ Monthly, Xerox runs a computer program and then issues thousands of retirement checks to the Plan participants entitled to benefits under the plan.²¹ This process stops only if affirmative steps are taken in the computer system to halt the benefits.²²

At Lusk's request, Delta provided her with estimates of her retirement benefits several times after she left Delta.²³ In mid-2012 or 2013, she received an unsolicited notice stating that she was eligible to receive benefits from the Plan, that the benefits would no longer accrue

¹³ *Id.* at 70-76.

¹⁴ *Id.* at 77-78.

¹⁵ *Id.* at 39.

¹⁶ *Id.* at 41.

¹⁷ Affidavit of Linda Little at 2.

¹⁸ Deposition of Greg Tahvonen at 13.

¹⁹ Affidavit of Linda Little at 2.

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ Deposition of Laverne Barksdale Kelly-Lusk at 93-108.

additional value, and that it would be in her best interest to apply for the benefits.²⁴ Lusk applied for the benefits. Her first pension check, dated August 1, 2013, included her retirement benefits for the months of May through August 2013.²⁵ Xerox mailed the check to her street address in Lubbock, Texas.²⁶ Lusk received the check and cashed it.²⁷

Xerox mailed benefits checks dated September 1, 2013, and October 1, 2013, in the amount of \$1,191.49 each. These checks were issued through the standard, automated process for issuing benefit checks from the Plan.²⁸ Xerox mailed the September 1 check to Lusk's street address in Lubbock, Texas.²⁹

On September 5, 2013, Lusk called Xerox's Employee Service Center (ESC). The parties disagree as to the purpose of this phone call. The ESC phone records state that Lusk called in to update her address and to see if her check was returned.³⁰ Kevin Tso, an ESC employee, updated her address and after checking to see if the check was returned, concluded that it had not been.³¹ Tso advised Lusk to allow for mailing time and the call ended.³² Lusk contends that she did not change her address; that both of her addresses were on file and the check would have been delivered to either address.³³ She notified ESC that her September check was late and she was told to wait until after September 10th, and give the check time to show up.³⁴

The September check, addressed to Lusk's street address was subsequently returned to Delta, postmarked September 6.³⁵ On September 6, Lusk again called the ESC stating that she

²⁴ *Id.* at 133.

²⁵ Affidavit of Linda Little at 2; Respondent's Exhibit (R. Ex.) 15.

²⁶ Affidavit of Linda Little at 3.

²⁷ Deposition of Laverne Barksdale Kelly-Lusk at 109-110, R. Ex. 15.

²⁸ Affidavit of Linda Little at 3.

²⁹ *Id.*

³⁰ Deposition of Kevin Tso at 13; Deposition of Greg Tahvonen, Exhibit 3.

³¹ Deposition of Kevin Tso at 13; Deposition of Greg Tahvonen at 17, Exhibit 3.

³² Deposition of Greg Tahvonen at 17; Exhibit 3.

³³ Deposition of Laverne Barksdale Kelly-Lusk, Exhibit 16 at 2.

³⁴ *Id.*

³⁵ Deposition of Greg Tahvonen at 18.

was entitled to severance pay and vacation pay when Delta terminated her employment. The ESC employee to whom she spoke located no check in the system prior to 1995, so he created a case to have that reviewed.³⁶ On September 6, Lusk also sent a letter to Delta Airlines, Inc., Department 971 that the Delta Air Lines Law Department received on September 9. In the letter, Lusk requested all job injury and medical records and complained that she was not paid severance, earned vacation pay, or for her final flight. She also stated that she had not received her September 2013 retirement benefits check.³⁷ On September 11, 2013, Lusk wrote to the ESC requesting a replacement check. This letter was received on September 16, 2013; the name of the individual who signed for it is illegible.³⁸

A Delta paralegal responded to Lusk's September 9th correspondence in a letter dated October 4, 2013, stating that Delta did not maintain the worker's compensation records and providing an address for Lusk to contact; that Delta was unable to provide copies of her medical records, payroll records, and employment records since her retirement date exceeded the retention policy pertaining to the records; and that Delta confirmed with the ESC that the September 1 and October 1 checks had been sent to her.³⁹

On October 7, 2013, Lusk wrote to Robert Kight, Vice-President of Global Human Relations Service & Labor Relations. The letter was signed for by Delta Employee Doug Tisdol on October 10, 2013.⁴⁰ Lusk requested the status of her September 1 pension check and stated that she had not received her October 1st check. She repeated her claims that she had not received severance, earned vacation pay, or pay for her final flight. She requested her Medical Records, injury reports, and "safety data postings and copies of material data sheets/air craft maintenance records."⁴¹

Linda Little, a Delta Air Lines Human Resources Delivery employee, explained the standard procedure for processing a returned check, stating that Xerox employees receive the check in Atlanta and forward the check to a Xerox office in Phoenix, Arizona. There, the check is scanned into the system, the contact information for the Plan participant is identified, and the participant is put on a list to receive an automated call asking him or her to call the ESC regarding the check.⁴² She explained that in Lusk's case:

³⁶ Deposition of Jacob Palmer at 7; Deposition of Greg Tahvonen, Exhibit 3.

³⁷ Deposition of Greg Tahvonen, Exhibit 6.

³⁸ Complainant's Exhibit 16.

³⁹ *Id.*, Exhibit 7.

⁴⁰ Complainant's Exhibit 15.

⁴¹ *Id.*, Exhibit 8.

⁴² Affidavit of Linda Little at 4.

Ms. Lusk's returned check was scanned and processed by Xerox employees, and her name was placed on the call list to receive an automated call. Xerox undertakes the automated calling process takes [sic] place only one time per month (generally in the middle of the month), and at the time Ms. Lusk's check was returned and processed, the mid-September calling process had already been completed. Accordingly, Ms. Lusk received an automated call in October 2013 asking her to contact the Employee Service Center.

Ms. Lusk called the Employee Service Center on October 18, 2013, and reported that she also had not received her October 2013 check in addition to her September 2013 check. The Employee Service Center representative (also a Xerox employee) advised Ms. Lusk that they would void the checks and reissue them. They were reissued on October 22, 2013 and sent to Ms. Lusk. This is a standard time frame for this to take place.^[43]

Little also stated, "The computer system reflects that no steps were ever taken to stop or otherwise interfere with Ms. Lusk's checks."⁴⁴

Greg Tahoven, Vice President of Total Rewards and Global Human Relations, testified that there is no specific direction addressing how much time should elapse before a missing check is replaced and that the elapsed period depends on the facts of the case. He stated that if a check is returned to sender (as it was in this case), the check is returned to Atlanta through a Xerox-run mail facility. The return triggers a request to determine the reason for the return. The practice then is to see if a call has been placed seeking the check and "within a reasonable time period," the check is reissued once payment has been stopped. He further averred that normally they hear from people who have not received checks quickly or the process is initiated by a returned check and it generally takes from seven to ten business days once the stop payment and reissuance procedures are completed.⁴⁵

Tahoven testified that he did not know why it took so long to replace Lusk's checks and that to his knowledge no one at Delta knew why it took so long for the September check to be issued.⁴⁶ Tahoven testified that he reviewed the computer history of Lusk's case and there was nothing to indicate that there would have been any interruption or any manual intervention that would have suspended or stopped a payment.⁴⁷ He also stated that the retirement checks are

⁴³ *Id.* at 4-5.

⁴⁴ *Id.* at 3.

⁴⁵ Deposition of Greg Tahvonen at 15-16.

⁴⁶ *Id.* at 17-19.

⁴⁷ *Id.* at 55.

batch run and mailed from a central distribution center.⁴⁸ So, the ability to pull an individual physical check by a Delta employee is “infinitesimally small.”⁴⁹ They are not done on site.⁵⁰

Several ESC Customer Services Representatives testified. Jeremy Spears stated that if a retiree reports that a check is missing, the representative will verify that the address is correct. If the address is correct there is a five-day waiting period before a new check will be issued, if the five-day period has passed, they do a stop and reissue to cancel that check and reissue a new one.⁵¹ Kevin Tso, who spoke to Lusk on September 5, stated that if the check has not been received within the first five days after the check date (about the 5th of the month), then the retiree could request a reissue. Reviewing his notes of his call, he stated that Lusk called in to update her address and to see if her check was returned. So he updated her address and checked to see if her check was returned, but it had not been.⁵² Jacob Palmer, who spoke to Lusk on September 6th about her severance and vacation pay concerns, but not her September check, says that the general waiting period before a check will be re-issued is 5-7 business days.⁵³ Abby Hanke, who spoke to Lusk on October 18th and “created the case” to have the September and October checks re-issued, stated that the ESC employees usually recommend that the retirees wait ten business days to see if the check has been lost in the mail, but if it is urgent, they can send it before the ten days has expired.⁵⁴ The ESC employees would usually accommodate a request for expedited handling.⁵⁵

Lusk never spoke to anyone at Xerox (ESC) about the methanol incident and never spoke to anyone at Delta about anything other than her retirement benefits after 1993.⁵⁶ Lusk did not know the procedure for issuing the checks or who is involved in it.⁵⁷ She believes that the complaints she made about the methanol 26 years previously were related to the late delivery of

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Deposition of Jeremy Spears at 8.

⁵² Deposition of Kevin Tso at 13-15.

⁵³ Deposition of Jacob Palmer at 11.

⁵⁴ Deposition of Abby Hanke at 21.

⁵⁵ *Id.* at 21-22.

⁵⁶ Deposition of Laverne Barksdale Kelly-Lusk at 90.

⁵⁷ *Id.* at 113.

the checks because at the time the checks were delayed, she was asking for material data sheets and medical records.⁵⁸

ALJ PROCEEDINGS

In an attempt to demonstrate that the delay in receiving the September and October checks was retaliatory, Lusk requested to depose Kight. Although Lusk's testimony as to how many times she wrote to Kight and when she wrote to him was unclear, in her brief to the Board she claims that she sent a letter to him. The letter to Kight in the record is dated October 7, 2013, by which time both the September and October checks were already delayed.⁵⁹ Delta objected to the deposition. After holding a conference call on the matter, the ALJ ruled that "based on the nature of the issues left for litigation and the fact that two lower level officers had already been deposed, the additional deposition was unlikely to lead to any information that would assist Complainant in obtaining additional evidence to enter into the record."⁶⁰ Thus, the ALJ granted Delta's motion for a protective order denying Lusk's motion to depose Kight.

After the ALJ ruled on Delta's motion to dismiss,⁶¹ it filed a motion for summary decision. A "Judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."⁶² To prevail upon hearing before an ALJ under TSCA, a complainant must prove by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) he or she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.⁶³

⁵⁸ *Id.* at 113-114.

⁵⁹ Lusk's deposition testimony on when she first contacted Kight is very confused. At one point she says she contacted him in 2012, when Delta first sent her the notice saying she was of age and should think about taking her pension (Lusk Depo. at 133); she subsequently stated that she received the notice from Delta in mid-2013 (Lusk Depo. at 134); after testifying that it was mid-2013 that she received the notice, she said "with that recall I would say it was when I was first contacted about the pension. That's when I first started asking him for that information" (Lusk Depo at 135); subsequently Lusk testified that there was a total of two communications—a letter to Kight and a letter from a Delta paralegal (Lusk Depo. at 137-138); then Lusk testified that the ESC gave her Kight's name and address in May 2013, when she indicated she wanted copies of her records and was given Kight's name again (Lusk Depo. at 139-140). The only communication Lusk relies upon in her brief to the Board is the October 7, 2013 letter.

⁶⁰ Ruling on Respondent's Motion for Protective Order and Rescheduling Hearing at 1.

⁶¹ *Kelly-Lusk v. Delta Airlines, Inc.*, ALJ Nos. 2014-AIR-004, 2014-TSC-003 (Apr. 15, 2014).

⁶² 29 C.F.R. § 18.72 (2016).

⁶³ 29 C.F.R. § 24.109(b)(2)(2016).

Delta argued that there was no genuine issue of material fact that would allow for a finding that 1) Lusk engaged in any protected activities, 2) Delta took any adverse actions, 3) there was any nexus between any of the alleged protected activities and the alleged adverse action. Lusk opposed the motion and responded that the motion was not ripe for adjudication until she had the opportunity for additional discovery. The ALJ continued the hearing date to allow Lusk an opportunity to develop evidence that would create a genuine issue of material fact. An extended period of discovery followed, and the parties filed briefs.⁶⁴

Lusk argued that the circumstantial evidence in the record is sufficient to create a genuine issue of material fact on the issue whether anyone involved in the delay of the pension checks knew about her alleged protected activities. She cited Delta's animus toward her, temporal nexus, deviation from normal practice, and pretext as evidence that the delay was not simply random or a mistake but a result of knowledge of her protected activity.⁶⁵

Recognizing that the case presented a number of difficult and novel issues for potential resolution, e.g., whether Lusk's alleged protected activities are covered by the TSCA and whether the delay in receiving the checks was an adverse action, the ALJ decided that the most straightforward way to dispose of the case was by first considering whether anyone involved in the alleged adverse action knew anything about Lusk's alleged protected activity.⁶⁶ He noted that "[t]he complainant must show that it is more likely than not that individuals who either made or had input into the adverse action decision knew of the protected activity."⁶⁷ The ALJ concluded that this issue presents an issue of fact and "does not require an interpretation of what qualifies under the Act as protected activity or a determination of what would dissuade a reasonable employee from engaging in protected activity. Acknowledging that unless there is a "smoking gun" admission of knowledge, the complainant will have to rely on circumstantial evidence, the ALJ stated that "circumstantial evidence must be viewed in the light most favorable to Complainant."⁶⁸

The ALJ concluded that the record raises a genuine issue of fact concerning whether there was an adversarial relationship between Delta and Lusk while she was working for Delta, but that was about 20 years before the delayed retirement checks. Lusk argued that the code

⁶⁴ Sum. Dec. Ord at 3.

⁶⁵ *Id.* at 6-7.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 3-4 & n.7 (citing *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 1, 1993); *Shirani v. Comed/Exelon Corp.*, (ARB Sept. 30, 2005) (Where new manager fired him and claimed no knowledge of protected activity, Complainant's allegation that termination was part of a broad conspiracy by employer was rejected as "barely rank speculation" without evidence that the managers who declined to offer him the position he applied for knew about the alleged protected activity)).

⁶⁸ *Id.*

“termed” in her retirement record demonstrated continuing hostility, but “termed” applied equally to former employees who had retired, quit or were fired.⁶⁹

The ALJ noted that Lusk had no idea how the pension administration system worked or how anyone involved in issuing her checks would know about any of her protected activities. Although Lusk identified individuals to whom she had made protected complaints, she also stated that there were probably more, and the ALJ found that a genuine issue of material fact does exist regarding whether the employees who were aware of her protected activities were limited to that list. But the ALJ found that Lusk’s affidavit that the methanol incident was well known does not mean that her protected activity was well known.⁷⁰

Ultimately, the ALJ concluded:

The Little affidavit, and testimony of Tahovnen, Tochilin, and the four Xerox employees were fundamentally consistent with each other and even that of Complainant. Weighing the evidence in the light most favorable to Complainant does not require an assumption that everything said contrary to her position was a lie. Complainant’s argument that there is a genuine question of fact that Xerox employees knew about Complainant’s letter to Kight, or any other alleged protected activity, is no more than speculation or a conspiratorial theory, unsupported by even the most favorable evidentiary inferences. The record in this case allows for no rational conclusion other than that Complainant’s retirement checks were issued and mailed by Xerox. The Xerox employees who dealt with Complainant had no specific knowledge of her or anything even remotely related to any letter she may have sent Robert Kight.

Since the remaining adverse action has no nexus to any protected activity, the complaint is **Dismissed**.^[71]

Lusk appealed the ALJ’s dismissal of her complaint to the Administrative Review Board.⁷²

⁶⁹ *Id.* at 8; Deposition of Kevin Tso at 17-18.

⁷⁰ *Id.* at 8-9.

⁷¹ *Id.* at 9.

⁷² The Secretary of Labor has delegated authority to decide this matter on appeal from the ALJ’s decision to the ARB. Secretary’s Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110.

DISCUSSION

The ARB reviews de novo an ALJ's grant of a motion for summary decision, and its review is governed by the same standard that governs the ALJ in deciding a motion for summary decision.⁷³

1. Lusk failed to raise a genuine issue of material fact regarding the knowledge of protected activity by individuals involved in the processing of her checks

Lusk argues on appeal that by demonstrating a deviation from normal practice, temporal proximity, and pretext, she has raised a genuine issue of material fact regarding whether the individuals who were involved in the processing of her retirement checks knew of her alleged protected activity in reporting the methanol incident 26 years previously. She also argues that the ALJ "erred" in denying her request to depose Kight.

Even if the delayed checks constitute an adverse action, the ALJ properly held that there is no genuine issue as to the material fact whether any of the Xerox employees responsible for issuing or re-issuing the retirement checks knew of Lusk's alleged protected activity. Lusk admits that she never discussed the methanol incident with any of the Xerox employees with whom she communicated regarding her retirement checks and their delayed arrival. Little stated in her affidavit, "The computer system reflects that no steps were ever taken to stop or otherwise interfere with Ms. Lusk's checks" and Tahoven testified that he reviewed the computer history of Lusk's case and there was nothing to indicate that there would have been any interruption or any manual intervention that would have suspended or stopped a payment. He also stated that the retirement checks are batch run and mailed from a central distribution center. So the ability to pull an individual physical check by a Delta employee is "infinitesimally small." Lusk admits that she did not know the procedure for issuing the checks or who is involved in it. She believes that the complaints she made about the methanol 26 years previously were related to the late delivery of the checks because at the time the checks were delayed, she was asking for material data sheets and medical records.

Delta's affidavits and testimony show that there was no indication in Xerox's computerized system that processed Lusk's retirement checks that there would have been any interruption or any manual intervention that would have suspended or stopped a payment and that the ability of any person to remove a check from the system was "infinitesimally small." Lusk testified that she did not know the procedure for issuing the checks and she had not told any of the ESC employees with whom she spoke regarding the checks about the methanol incident. Her theory was that the checks were delayed in retaliation for the methanol incident because she was asking for material data sheets and medical records at the time the checks were delayed.⁷⁴

⁷³ *Alexander v. Atlas Air, Inc.*, ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 3 (ARB Sept. 27, 2012); *see supra* at 8.

⁷⁴ Lusk also asked for a material safety data sheet and OSHA HazMat safety information immediately following her ingestion of the methanol, but there is no suggestion that the supervisors she requested the information from were still at Delta, much less in a position to interfere with Xerox's issuance of her retirement checks.

But in fact, her September letter to Delta was delivered after the September check was already late and her October letter to Kight was delivered after both the September and October checks had been delayed.⁷⁵ Lusk's argument also ignores the fact that Delta initiated her receipt of her retirement benefits by sending her an unsolicited letter informing her that it was in her best interest to apply for them because they were not going to increase in value. Even if Lusk had contacts with Kight, other than the one letter in the record upon which she relied, she has failed to proffer any facts (as opposed to conspiracy theories) establishing that anyone responsible for processing her retirement checks knew that she had engaged in any allegedly protected activity prior to the delayed checks.

While there may have been an anomaly in the processing of Lusk's September check, it does not create a *material* issue of fact. The only anomaly evident in the processing procedures for Lusk's September check was that she wrote to the ESC on September 11th (received on September 16th) stating that her check was still missing. Tahoven testified that, if a check is returned to sender (as it was in this case) the check is returned to Atlanta through a Xerox-run mail facility. The return triggers a request to determine the reason for the return. The practice then is to see if a call has been placed seeking the check and "within a reasonable time period," the check is reissued once payment has been stopped. He further averred that normally they hear from people who have not received checks quickly or the process is initiated by a returned check and it takes from seven to ten business days generally speaking once the stop payment and reissuance procedures are completed. Although Tahoven testified that he did not know why it took longer than usual for the September check to be re-issued, it appears that the system may be geared towards "calls" rather than letters. Other than the fact that Xerox could have known from Lusk's letter on September 16th that she had not received the check, the re-processing of the check appears consistent with the procedures outlined by Little and Tahoven and the testimony of the ESC employees. In any event, even if the September check was not handled in accordance with general return procedures, Lusk has not raised any genuine issue that the Xerox employees responsible for executing the replacement procedures knew of her alleged protected activities. Further, in regard to the October check, unlike the September check, it was never returned to Delta, but once Lusk called the ESC to explain that she had not received it, she was issued a new check within the generally acceptable time frame.

2. The ALJ did not abuse his authority in denying Lusk's motion to depose Kight

The ALJ also did not err in denying Lusk's request to depose Kight. The Board reviews the ALJ's decision to grant a protective order under an abuse of discretion standard.⁷⁶ Here the ALJ determined that "based on the nature of the issues left for litigation and the fact that two lower level officers had already been deposed, the additional deposition was unlikely to lead to

⁷⁵ To establish her request for such records, Lusk relies on two letters, one addressed generally to Delta Airlines Department 971 that was received on September 9, 2013, and one addressed to Robert Kight that was signed for by Doug Tisdol for Delta on October 10, 2013.

⁷⁶ *McCarthy v. Barnett Bank*, 876 F.2d 89, 91 (11th Cir. 1989); *Shirani v. Com/Exelon Corp.*, ARB No. 03-028, ALJ No. 2002-ERA-028, slip op. at 4 (ARB Dec. 10, 2002)(the Board is most reluctant to interfere with an ALJ's control over the course of a hearing, "but rather should support the sound exercise of an ALJ's broad discretion in this area." (citations omitted)).

any information that would assist Complainant in obtaining additional evidence to enter into the record.”

Tahoven had testified as to the procedures for issuing and re-issuing retirement checks; the letter to Kight, upon which Lusk relies to implicate him in this case, was not received until both the September and October checks had already been delayed; and Lusk admitted that she had not informed any of the ESC employees, responsible for processing her checks, of her alleged protected activity. Accordingly, the ALJ’s refusal to permit Kight’s deposition was not an abuse of discretion.

CONCLUSION

We ultimately conclude that, viewing the evidence in the light most favorable to Lusk, she has failed to point to any evidence in the record that could support a finding that any person involved in the initial processing of her retirement check or in arranging for the replacement checks, knew, or had constructive knowledge of, any alleged protected activity in which she engaged. For this reason, and those stated above, we **AFFIRM** the ALJ’s order granting summary decision and **DISMISS** Lusk’s complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge