U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 November 2020

OALJ Case No.: 2019-FDA-00015
OSHA Case No.: 5-1260-18-107

In the Matter of:

EDITH MCCURRY,
Complainant,

v.

KENCO LOGISTICS SERVICES, LLC,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

Complainant Edith McCurry is suing her former Employer, Kenco Logistics Services, LLC ("Respondent" or "Kenco"), alleging whistleblower retaliation in violation of the Food Safety Modernization Act ("FSMA"), 21 U.S.C. § 399d,[1] and the implementing regulations at 29 C.F.R. Part 1987. Ms. McCurry avers that she testified in a whistleblower case involving FSMA violations made by another Kenco employee, and Kenco responded by denying her long-term disability benefits. Because I find that no evidence has been presented raising an inference that any such testimony could have contributed at all to the denial of disability benefits, I shall GRANT Respondent's motion for summary decision.

Background

On August 29, 2016, Complainant filed an employment discrimination suit in the United States District Court for the Central District of Illinois against her former employer, Kenco, later consolidated with a second action against the same Respondent. The actions, in part, included allegations surrounding Complainant's receipt of disability benefits.[2]

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[1] The Food Safety Modernization Act ("FSMA") contains procedural and remedial protections for whistleblowers in the food industry. Under the FSMA, employers who manufacture, process, pack, transport, distribute, receive, hold, or import food are prohibited from discharging or "discriminat[ing] against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment" for raising food safety concerns. 21 U.S.C. § 399d(a)(1)-(4).

[2] 2:18-CV-02273 and 2:16-CV-02277. Complainant filed a third action in federal district court on March 23, 2018, alleging this Respondent, and others, retaliated against her "when they changed [her] COBRA premium five (5) times and coverage for medical because she engaged in protected activity." *McCurry v. Kenco Logistics Services,*

On April 20, 2018, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), alleging Kenco retaliated against her for engaging in activity protected under the FSMA by denying her disability benefits on December 26, 2017, the same disability benefits at issue in the federal court litigation.[3]

The District Court for the Central District of Illinois granted summary judgment in Respondent's favor on August 14, 2018. On October 17, 2018, Complainant appealed the decision to the United States Court of Appeals for the Seventh Circuit.

On May 3, 2019, OSHA issued a final determination letter dismissing the DOL complaint. On June 7, 2019, Complainant, through her then counsel Jordan T. Hoffman, Esq., filed objections to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ").

By *Prehearing Order* issued by the undersigned on July 2, 2019, the matter was set for hearing on the merits on November 13, 2019; all discovery was to be completed at least forty days before the hearing, with dispositive pretrial motions filed at least thirty days before the hearing and any responses filed seven days thereafter.

On September 4, 2019, Respondent filed *Motion for Summary Decision* and *Motion for Continuance of the Hearing Date and Reset All Discovery and Pre-Hearing Deadlines*.[4] On September 18, 2019, Complainant filed *Motion to Enlarge Time to Respond to Motion for Summary Decision* ("Motion to Enlarge").

On September 25, 2019, I issued an order denying the motions to continue the hearing and reset discovery and pre-hearing deadlines. Instead, I converted the November 13, 2019 hearing to a pretrial session and limited its scope to whether the April 20, 2018 complaint was barred by collateral estoppel and whether Complainant can present some evidence that her protected activity could be a contributing factor in the alleged adverse employment action. The order explained that a hearing on the merits would not be scheduled until the court ruled on the pending motion for summary decision and that the parties need not be prepared to call merits witnesses at the November 13, 2019 session. Remaining discovery was limited to that necessary to prepare for the pretrial hearing. My September 25, 2019 order also granted Complainant's Motion to Enlarge, setting a deadline of October 8, 2019 for Complainant's response to Respondent's Motion for Summary Decision, with any reply from Respondent due October 25, 2019.

LLC, et al., 2:18-CV-02093, slip op. at 1 (C.D. Ill., May 2, 2018). The District Court dismissed the case as malicious. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

[3] Complainant has never articulated or identified a specific violation of the FSMA or of a food safety law generally, although she alleges the retaliation is because she "provided sworn testimony in a whistleblower case relative to FSMA violations."

[4] Respondent submitted that collateral estoppel applies in this matter as Complainant's allegations that Respondent retaliated against her by reducing her long-term disability benefits have been decided by a federal court. The collateral estoppel doctrine does generally provide that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future case.

On October 9, 2019, Respondent filed *Respondent's Motion for Reconsideration and Clarification as to the Order Dated September 25, 2019* ("Motion for Reconsideration"). On October 15, 2019, Complainant filed *Complainant's Objection to Respondent's Motion for Reconsideration and Clarification as to the Order Dated September 25, 2019*. On October 22, 2019, I denied the Motion for Reconsideration, finding none of the grounds for reconsideration contemplated by FRCP 60(b) were present.

On October 23, 2019, Complainant, again through her then counsel Jordan T. Hoffman, Esq., filed *Response to Motion for Summary Decision* suggesting that, given a pending appeal before the United States Court of Appeals for the Seventh Circuit of two orders entered by the United States District Court for the Central District of Illinois, it would be appropriate to hold this case in abeyance until the Seventh Circuit rendered its decision. By Order issued on October 24, 2019, I cancelled the November 13, 2019 hearing and granted the unopposed motion to hold the case in abeyance pending a decision from the court of appeals.

On June 17, 2019, Complainant filed a fourth action against Kenco Logistics Services, Inc., this time in the United States District Court for the Northern District of Illinois.[5]

On November 7, 2019, the Seventh Circuit issued a decision affirming the United States District Court for the Central District of Illinois's grant of summary judgment in favor of Kenco, finding that Kenco was not the proper Respondent regarding claims involving receipt of COBRA-related benefits from a third-party benefits administrator.[6]

By letter dated March 30, 2020, Respondent sought an order from this court dismissing the instant case as Complainant is "collaterally estopped from pursuing her claim against Kenco at the Department of Labor because the federal court already made conclusive findings of fact on the same allegations," serving a copy on Mr. Hoffman. However, on April 10, 2020, Mr. Hoffman notified the court that he no longer represented Ms. McCurry in this matter, filing a formal *Motion to Withdraw* on April 16, 2020, which the court granted on April 17, 2020.

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[5] *McCurry v. Mars, Inc., et al*., No. 19-cv-04067, 2020 WL 6075872 (N.D. Ill. Jun. 17, 2020).

I note that, under the enforcement provisions of the FSMA, if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, and the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. 21 U.S.C. § 399d(b)(4)(A). Complainant filed her OSHA complaint on April 20, 2018, and a final DOL decision had yet to be issued by the time Complainant filed her action with the Northern District of Illinois.

However, Respondent does not argue, and this court makes no finding, that Complainant's retaliation and discrimination claims filed on June 17, 2019, and pending before the United States District Court for the Northern District of Illinois, constitute a removal action under the provisions of 29 C.F.R. § 1987.114, thus depriving this tribunal of jurisdiction over Ms. McCurry's DOL FSMA retaliation claim. *See Stone v. Duke Energy Corp.*, 432 F.3d 320, 322-23 (4th Cir. 2005) (explaining that jurisdiction is conferred on a district court "when a qualifying complainant files his complaint there"); *see also Despain v. BNSF Ry. Co.*, 186 F. Supp. 988, 991 (D. Ariz. 2016) (Federal Railroad Safety Act).

[6] *McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783 (7th Cir. 2019). The Court affirmed the district court's order granting summary judgment on December 16, 2019, finding the appeal was frivolous and warranted sanctions under Rule 38 of the Federal Rules of Civil Procedure.

In the same April 17, 2020 order, I lifted the October 24, 2019 *Order Holding Case in Abeyance* and gave Ms. McCurry time to find and retain new counsel. If Ms. McCurry was able to retain new counsel, that individual was to file a response to Respondent's pending *Motion for Summary Decision* by June 15, 2020, or request appropriate relief. If Ms. McCurry was not able to retain new counsel, I advised her of her right as a self-represented litigant to conduct discovery and the procedures for responding to a motion for summary decision as set forth in 29 C.F.R. 18.72[7] and ordered her to respond to the Motion for Summary Decision and show cause, also by June 15, 2020, why she is not collaterally estopped from pursuing her claim against Kenco in this forum and why her request for hearing should not be dismissed.[8] By Order issued August 6, 2020, I extended Ms. McCurry's time to respond. Ms. McCurry, representing herself, filed *Response Opposing Respondent's Motion for Summary Decision* on September 30, 2020.

Essential Findings of Fact

Kenco Logistics Services, LLC, provided warehouse management services for candymaker Mars, Inc. at Mars' Manteno, Illinois plant. Kenco hired Ms. McCurry as a human resources administrator at the Manteno facility in April 2013. Ms. McCurry was approved for a medical leave of absence on January 25, 2015. On January 29, 2015, Kenco notified all its employees at the Manteno plant, to include Complainant, that they would be laid off effective March 29, 2015 because Kenco had lost the Mars contract.

After her termination, Ms. McCurry elected to continue health care benefits coverage in the Kenco Management Group Health Care Plan under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Kenco's plan was administered by a third party, Hartford Life and Accident Insurance Company ("Hartford"). Kenco had and has no involvement in the determination to award, grant, deny, terminate, or reinstate health benefits under the plan. These decisions are made solely by adjusters and analysts at Hartford.

Though her payments were occasionally delayed, Ms. McCurry began receiving short-term disability benefits on January 23, 2015. After exhausting her short-term disability benefits, Ms. McCurry eventually transitioned to long-term disability. Hartford terminated Ms. McCurry's long term benefits in July 2017, but later reversed the decision in February 2019 after an appeal, retroactive to July 2015, with Ms. McCurry being paid at an adjusted rate to compensate for the underpayments. The termination was based on an erroneous determination that Ms. McCurry was capable of some work.

On August 29, 2016, Ms. McCurry filed an action in United States District Court for the Central District of Illinois against Kenco, later consolidated with a second action against Kenco, which included allegations surrounding Complainant's receipt of long-term disability benefits, the same long-term disability benefits at issue in this administrative proceeding.

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[7] *See Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 13 (ARB May 8, 2017).

[8] As noted above, as a self-represented litigant apparently lacking legal expertise, this Court has afforded Ms. McCurry "a degree of adjudicative latitude" as it relates to the motion for summary decision and has drawn inferences from the facts in this case that it might not otherwise have made for purposes of this order. *Hyman v. KD Resources, Inc., et al*., ARB No. 09-076, ALJ No. 2009-SOX-020, slip. op. at 8 (ARB March 31, 2010) (*citing Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008)).

On April 20, 2018, Ms. McCurry filed a complaint with OSHA, alleging Kenco retaliated against her for engaging in activity protected under the FSMA by denying her long-term disability benefits on December 26, 2017. The complaint did not identify a specific violation of the FSMA or of a food safety law generally. However, in her filings, Ms. McCurry alleges she testified in a prior case involving FSMA violations.[9]

The District Court granted summary judgment in Kenco's favor on August 14, 2018. The district court held that "a third party benefits administrator, not Kenco, handled COBRA notices and any communications related to changes in COBRA costs" and that the proper defendant for ERISA and COBRA-related claims "is the Plan Administrator, not Kenco." *McCurry v. Kenco Logistics Services, et al*., 2:16-CV-2273, slip op. at 15 (C.D. Ill. Aug. 14, 2018). On November 7, 2019, the Seventh Circuit issued a decision affirming the district court's grant of summary judgment in favor of Kenco, finding that Kenco is not the proper Respondent regarding claims involving receipt of COBRA-related benefits from a third-party benefits administrator.

On June 17, 2019, Complainant filed another action against Kenco Logistics Services, Inc., this time in the United States District Court for the Northern District of Illinois. Ms. McCurry alleges claims against Kenco and Hartford, among others, for retaliation and discrimination in violation of Title VII of the Civil Rights Act and for violations of the Employee Retirement Income Security Act ("ERISA") seeking recovery of disability benefits pursuant to the terms of an employee benefit plan.[10]

There is no joint employer or fiduciary relationship between Kenco and Hartford. No one at Hartford consulted anyone at Kenco before granting or denying Ms. McCurry health care benefits and no one at Kenco had any input into the decision, which was Hartford's alone. No one at Hartford was aware that Ms. McCurry had provided a sworn declaration at a prior whistleblower hearing.

Legal Standard Under the Food Safety Modernization Act

The FSMA amended the Food, Drug, and Cosmetic Act, 21 U.S.C. § 391 et seq. and adopted a new whistleblower protection provision that contained procedural and remedial

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[9] Ms. McCurry appears to be referring to the case of *Madison v. Kenco Logistics Services, Inc.*, 2016-FDA-00004 (Nov. 22, 2017). Mary Madison filed a complaint against Kenco Logistics on September 10, 2013, alleging that she was terminated in reprisal for raising food-safety concerns. OSHA dismissed the complaint on February 17, 2016 and Ms. Madison requested a hearing before OALJ. As part of her response to Kenco's motion for summary decision, Ms. Madison submitted a declaration from Edith McCurry stating that an employee reported to her that there was an infestation of flies in the men's bathroom at the Manteno facility. The presiding administrative law judge granted Kenco's motion for summary decision on reconsideration and dismissed Ms. Madison's claim on November 22, 2017.

[10] The district court denied Kenco's Motion to Dismiss based on claim preclusion on October 15, 2020. *McCurry*, 2020 WL 6075872, at *9. Following the district court's ruling, Complainant again requested that Respondent's motion for a summary decision be denied. Conversely, Respondent argued that the summary decision should be granted because Complainant is "collaterally estopped from re-litigating the fact that Kenco is not the proper Respondent…and because the Department lacks jurisdiction over this ERISA issue that does not involve the FSMA."

protections for whistleblowers in the food industry. The relevant provisions of Section 399d(a) of the FSMA applicable to the issues in this case provide that:

> No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—
> …
>
> (3) testified or is about to testify in a proceeding concerning such violation.

Like other recently enacted reform statutes containing whistleblower protections, Congress placed the responsibilities for the exercise of the substantive protections in the FSMA with the particular agency with relevant regulatory expertise, while placing the authority for implementing whistleblower regulatory protections against retaliation of food sector employees with the Secretary of Labor. *See* 29 C.F.R. Parts 18 and 97. Accordingly, the Food and Drug Administration of the Department of Health and Human Services has the responsibility for drafting and implementing the actual governing food safety regulations, while the Department of Labor has the authority to issue rules and regulations implementing the whistleblower protection provision of the Act.[11]

The regulations implementing the Act provide that a "determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1987.109(a). As with the other "contributing factor" statutes, a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, slip. op. at 11, 29 (ARB March 20, 2015); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *see also Addis* v. *Dep't of Labor*, 575 F.3d 688, 689-91 (7th Cir. 2009) (discussing *Marano* as applied to analogous whistleblower provision in the ERA); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)).[12]

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[11] DOL's responsibility for receiving and investigating whistleblower reprisal complaints under the FSMA has been delegated to the Assistant Secretary for Occupational Safety and Health ("Assistant Secretary"). Secretary of Labor's Order No. 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); Interim Final Rule Procedures for Handling Retaliation Complaints Under Section 402 of the FDA Food Safety Modernization Act (Feb. 13, 2014), Section 1987.102 Obligations and Prohibited Acts, 79 Fed. Reg. 8619; 29 C.F.R. 1987. *De novo* hearings on objections to the Assistant Secretary's findings are conducted by the Office of Administrative Law Judges and appeals from decisions by ALJs are decided by the Administration Review Board ("ARB"). Secretary of Labor's Order No. 2-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 79 C.F.R. 8619; 29 C.F.R. Part 1987.

[12] The current version of the FSMA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform

Consequently, in order to meet her burden of proving a claim under the FSMA, Ms. McCurry must prove by a preponderance of the evidence that: (1) she engaged in a protected activity; (2) Respondent knew of the protected activity; (3) she suffered an unfavorable, or adverse, personnel action; and (4) such protected activity was a contributing factor in the unfavorable, or adverse, personnel action.[13] *See, e.g.*, *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007). A "contributing factor" includes "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 11 (Jan. 6, 2017) (internal citations omitted).

Summary Decision Standard

Under 29 C.F.R. § 18.72(a), an administrative law judge may enter summary decision for either party "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." A genuine issue of material fact is one that, if resolved, could establish an element of a claim or defense and therefore affect the outcome of the litigation." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). No genuine issue of material exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who "must do more than simply show there is some metaphysical doubt as to the material facts and must come forward with specific facts showing there is a genuine issue for trial." *Hess v. Union Pac. R.R.*, 898 F.3d 852, 857 (8th Cir. 2018) (internal citations omitted). In reviewing a motion for summary decision, I must view all evidence in the light most favorable to the nonmoving party.

When a respondent moves for summary decision on the grounds that a complainant lacks evidence of an essential element of his claim, the complainant is required under 29 C.F.R. Part 18 to present some evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A "genuine issue exists when the **nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial**." *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-035, slip op. at 4 (ARB Sept. 30, 2005) (emphasis added). At the

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Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b)(2)(B)(i). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. *Yowell v. Fort Worth & Western R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 5 (ARB Feb. 5, 2020). If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

[13] Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly reiterated that there are only three essential elements to a whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc*., ARB No. 12-022, ALJ No. 2010-FRS-25, slip op. at 3 (ARB Apr. 30, 2013); *see also Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3, slip op. at 2 n. 5 (ARB July 17, 2015) (stating that knowledge is not a separate element but instead forms part of the causation analysis).

summary decision stage, a complainant's failure to come forward with some evidence as to each element of the offense is fatal to her case.

Conclusions of Law

As Ms. McCurry correctly notes in her response to the Motion for Summary Decision, post-employment discrimination may be actionable and I find the record is such that it creates a genuine issue of material fact regarding whether the Complainant engaged in activity protected under the Act and whether she suffered an adverse action. In other words, Complainant's assertion that she "provided sworn testimony in a whistleblower case relative to FSMA violations" may qualify as protected activity and diminution or denial of a former employee's post-termination disability benefits may constitute an adverse action.

However, while there may be sufficient evidence in the current record to demonstrate an issue appropriate for a hearing regarding whether the Complainant engaged in protected activity and whether the Respondent took adverse personnel actions against her, the evidence must also be sufficient to create a triable issue as to whether the protected activity of testifying at a prior proceeding contributed in any way to the elimination or reduction of her disability benefits. It is here Complainant fails in her burden to present any evidence establishing that such protected activity could have been a contributing factor in the adverse action.

It is clear given Ms. McCurry's litigation history that she believes she has been wrongfully deprived of disability benefits and believes she is entitled to be recompensed. That may or may not be true. In this case, however, the only issue is whether Kenco took such action against Ms. McCurry at least in part in retaliation for her testifying in another FSMA proceeding.

It is beyond peradventure that employees of Hartford, not Kenco, have taken all actions related to Ms. McCurry's disability benefits. There is absolutely no evidence Kenco instructed, suggested, requested, directed, colluded, or conspired with Hartford to deprive McCurry of such benefits.[14] The decision to deny benefits was Hartford's alone and made on an incorrect, though honest, belief that Complainant was capable of work, a determination Hartford eventually rectified.

Regarding Respondent's contributing factor burden, my role is not to question whether Hartford's decision to deny Ms. McCurry disability benefits or whether any delay in reinstating them was correct or based on sufficient "cause" under the plan's policies and procedures. The decision to disapprove Ms. McCurry's post-termination long term disability benefits may have been unfair, unwarranted, and excessive and the delay to reinstate them unreasonable. However, none of this is relevant to the narrow issue before me of whether, looking at all the evidence, Ms. McCurry's declaration on behalf of another employee in a 2016 whistleblower action before OALJ could have contributed at all to the denial of benefits.[15] Given a third party, not Kenco,

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[14] Any inference of causation can be broken by an intervening event or by lack of knowledge of the protected activity by the decision-maker. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n. 12 (ARB May 27, 2015).

[15] The FSMA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Collins v. Am. Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

administered Kenco's health plan, the absence of any evidence that Kenco had any role in any of the decisions made by Hartford in Ms. McCurry's application for disability benefits, and Ms. McCurry's failure to present any evidence that anyone at Hartford had any knowledge of a prior case in which Ms. McCurry provided sworn testimony, I find it could not.

As three federal courts have previously found, Kenco's employee health care plan is managed by a third-party administrator, Hartford. Kenco has no role in approving or denying benefits under the plan and had no involvement in any of Ms. McCurry's applications for disability benefits, the appeal of the December 2017 denial of benefits, or the subsequent reversal. No Kenco employee discussed Ms. McCurry's testimony in any whistleblower proceeding with any Hartford employee, and no Hartford employee was aware of any role Ms. McCurry may have played in such a proceeding when reviewing and acting on her application for disability benefits.

Having reviewed the record before me on Respondent's motion for summary decision, and viewing the facts in the light most favorable to the Complainant, I find that the record is sufficient to create a genuine issue of fact regarding whether the Complainant engaged in protected activity and whether she suffered an adverse action. However, the record before me does not create a genuine issue of material fact as to whether Complainant's protected activity was or could have been a contributing factor in the adverse action. Accordingly,

ORDER

Respondent's Motion for Summary Decision is GRANTED. The Complaint is DENIED.[16]

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[16] 29 C.F.R. § 1987.109(d)(2) requires denial of the complaint rather than dismissal when the ALJ determines the respondent did not violate the FSMA.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1987.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1987.110(a).

At the time you file the Petition with the Board, you must serve it on all parties 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 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1987.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1987.109(e) and 1987.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1987.110(b).