



Issue Date: 03 August 2018

CASE NO.: 2018-LCA-00021

In the Matter of:

JASON L. NIEMAN,
Prosecuting Party,

v.

SOUTHEASTERN GROCERS, LLC,
Respondent.

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101 et seq. (“INA”) and its implementing regulations, 20 C.F.R. Part 655, Subparts H and I, § 655.700 et seq. Specifically, Prosecuting Party Jason Nieman (“Prosecuting Party” or “Nieman”) alleges Southeastern Grocers, LLC (“Southeastern” or “Respondent”) retaliated against him in violation of the whistleblower protections of the INA.

On June 26, 2016, Nieman informed the Wage and Hour Division of the Department of Labor that he suspected Southeastern was violating immigration law with regard to its visa sponsorship program. WHD conducted an investigation and found no violations. But what is salient to this matter is that nobody at Southeastern knew who contacted WHD, and certainly didn’t know that it was Nieman. So any adverse action that he alleges that occurred in response to his June 2016 contact with WHD couldn’t have been in retaliation for that contact.

Nieman again contacted WHD on June 24, 2017, claiming that he had suffered retaliation for his earlier contact and claiming that he had additional information for WHD to consider with regard to Southeastern’s hiring process. He contacted WHD by email, and copied the acting Chief Executive Officer of Southeastern on it. But Southeastern had begun the process of terminating Nieman a day earlier, on June 23, 2017, and nobody involved in the termination decision knew that Nieman had contacted WHD on June 24. So his termination couldn’t have been in retaliation for his contacting WHD on June 24. And Nieman has provided no evidence to support his claim that other post-termination actions by Southeastern were in retaliation for his having prompted or participated in the WHD investigation.

Accordingly, Respondent’s motion for summary decision will be granted. As a result, all other pending motions are moot, and will be denied on that basis.

Procedural History

In June of 2016, Nieman requested WHD to investigate Southeastern's visa sponsorship program. After an investigation, WHD concluded that no violations had occurred. On June 24, 2017, Nieman requested WHD to reopen its investigation. Southeastern terminated his employment on July 10, 2017. On May 16, 2018, the Wage and Hour Division issued a determination letter, finding that Southeastern did not violate the law. Disagreeing with the agency's findings, on May 22, 2018, Nieman requested a formal hearing before the Office of Administrative Law Judges. The case was docketed with the Office of Administrative Law Judges on June 1, 2018, and was assigned to me on June 4, 2018. Due to the short deadlines imposed by the INA, the matter was scheduled for hearing on July 12, 2018 in Jacksonville, Florida. By order dated July 2, 2018, the hearing was continued to August 20, 2018 upon finding compelling reasons for delay and consent by the parties.

On July 2, 2018, I issued an Order Denying Pending Motions, including Prosecuting Party's Motion for Summary Decision. I denied the motion because I found there was a genuine dispute of material fact as to whether there is a causal relationship between the adverse employment action and the alleged protected activity.¹ On July 24, 2018, Respondent filed its Motion for Summary Decision. Prosecuting Party filed a 107-page Opposition to Respondent's Motion for Summary Decision on August 1, 2018.

Undisputed Material Facts

Southeastern offered Nieman the position "Senior Manager, Liability" on May 21, 2015, and he accepted the position on June 1, 2015.²

On October 1, 2015, Southeastern announced a "large job elimination event," and the next day, Neiman filed an age discrimination complaint with the Equal Employment Opportunity Commission (EEOC), alleging that he suffered a "partial constructive discharge ... by way of a substantial change in [his] job duties and the movement of a substantial number of subordinates to a much younger peer."³ On November 25, 2015, Nieman filed another EEOC charge, re-alleging the same facts as the October complaint and adding retaliation in violation of the Age Discrimination in Employment Act and the Florida Human Rights Act.⁴ Nieman notified Southeastern that he filed this charge by carbon-copying Lynn Boston on the email to EEOC.⁵

In late 2015, Sedgwick employees complained to Sedgwick's Associate Relations about Nieman.⁶ They alleged that Nieman, through his demeanor and interactions with them, created a hostile work environment. On December 16, 2015, Nieman sent an email to Stacy Brink to provide his side of the story. Nieman put forth three main defenses. First, he suggested that the

¹ Furthermore, I declined to make a finding that Prosecuting Party in fact engaged in protected activity. Rather, I ruled there was sufficient evidence that he did to go forward with the hearing. *See* Order Denying Pending Motions, p. 8, n. 4.

² Prosecuting Party's Motion for Summary Decision Exhibit A (PPMSD Ex. A).

³ Nieman Deposition Exhibit 8 (Nieman Dep. Ex. 8).

⁴ Nieman Dep. Ex. 9.

⁵ Nieman Dep. Ex. 30. This email does not specify the date of the email, however based on Respondent's representation in its motion for summary decision I will assume that this email relates to this charge. *See* Respondent Motion for Summary Decision, p. 3.

⁶ PPMSD, Ex. E.

complaints were a response to his efforts in uncovering a fraudulent scheme perpetuated by Sedgwick employees. Because of his efforts, Sedgwick employees Aaron Renninger, Sherri Audette, and Richard Wardrip were reprimanded and Southeastern was refunded \$5,000. Second, Nieman suggested that he was following orders from his superior, Michael Bellomo, who instructed Nieman “to drive performance at Sedgwick, even if they were a bit offended,” encouraging Nieman to “hit them over the head and get them moving in the right direction.”⁷ Third, Nieman agreed that he was “demanding” of the Sedgwick team,” but denied violating any of Southeastern’s rules or conduct policies.⁸

Approximately one month later, Ken Jones (Vice-President and Treasurer) sent an email to Nieman requesting to meet on January 20, 2016 to discuss his updated job description.⁹ Nieman and Jones met as scheduled, and later that day Nieman sent an email to Jennifer Powers to recount the meeting. Nieman started the email by expressing his belief that the issues in the email were related to his pending EEOC/FCHR charges. Shortly after the meeting began, Jones brought up the Associate Relations investigation. Jones and Nieman discussed the allegations; Nieman maintained he did nothing wrong, consistent with his statements to Brink in December. Jones requested Nieman to be more diplomatic in his interactions with the Sedgwick team and be respectful at all times. At one point during the meeting, Jones surprised Nieman by posing the question, “Do you want to work here?”¹⁰ According to Nieman, the conversation seemed to turn in a direction as if Jones was encouraging Nieman to leave the organization. At the conclusion of the email, Nieman asked Powers to provide a status update of the investigation and to advise whether Southeastern intended to take any disciplinary action against him. Powers advised that Southeastern HR recommended Jones meet with Nieman to provide clear expectations on how to engage respectfully with Sedgwick partners, and that she would note his file to reflect the meeting occurred, per HR’s recommendations.

On April 9, 2016, Nieman sent an email to the EEOC complaining that he has been trying to get the Miami EEOC office to transfer the pending charge from the mediation division back to the investigation division.¹¹ In the email, Nieman continued to allege age and race discrimination, but also added that CEO Ian McLeod “has potentially been misusing H1B visas to recruit persons from the U.K. and Australia to supplant U.S. citizens in certain roles even though the roles in question do not fit the profile of specialty positions with unique skills that cannot be found by way of local and/or regional talent.”¹² After being advised that the EEOC lacks authority to investigate violations of immigration law,¹³ on June 26, 2016, Nieman filed a complaint with the Department of Labor’s Wage and Hour Division and completed a Nonimmigrant Worker Information Form (Form WH-4) with the following handwritten statement:

Ian McLeod, noted as a Scottish citizen, was hired as CEO on or about March 2015. Since that time, he has added or replaced a number of high level executive and other positions (example: Joshua Van Coevorden, paralegal in the employment law division)

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ PPMSD Ex. C.

¹² *Id.*

¹³ See Prosecuting Party Motion for Summary Decision, p. 2.

with citizens of the United Kingdom or Australia. Some of these persons do not appear to be objectively qualified (such as Van Coevorden). The positions in question do not arguably involve specialty knowledge, education or skills unavailable as to U.S. citizens who applied or could have been recruited. Employer may fit definition of willful violator.¹⁴

Nieman attached to his complaint printouts of the LinkedIn profiles of: (1) Michelle Vanstaden, Vice-President – Central Operations; (2) Mark Scates, Senior Vice-President of Store Operations; (3) Sharry Cramond, Executive Vice-President, Marketing and Communications (Chief Marketing Officer); (4) Joshua Van Coevorden, Employment Law Division.

In May 2016, Nieman applied for a promotion to the position of “Director, Risk Management.”¹⁵ On July 7, 2016, Southeastern advised that it would not offer him that position, but offered to promote him to the position of “Director, Claims Management” instead;¹⁶ Nieman accepted the offer on July 12, 2016.¹⁷

On July 21, 2016, the Department of Labor’s Wage and Hour Division sent a letter to CEO Ian McLeod, advising that Southeastern “has been scheduled for investigation pursuant to and under authority of INA and implementing regulations at 20 C.F.R. Part 655.”¹⁸

In November 2016, Nieman began experiencing issues with Vice-President and General Counsel M. Sandlin (“Sandy”) Grimm about Southeastern’s tender process.¹⁹ Grimm wanted to refine the current process because there was insufficient communication between the teams, which was leading to expensive outcomes for the company. In one particular case, *Lanza v. Southeastern Grocers*, a case involving a shooting fatality, Grimm was upset with the fact that Southeastern “spent \$37,000 defending a case that they are fully indemnified for.”²⁰ On December 6, 2016, Grimm sent an email to Nieman stating: “After conferring with outside counsel I see no legal reason that precludes us from aggressively pursuing indemnity at the outset of any claim. Let’s get together to determine proper process and instructions for our TPA and outside counsel accomplish [*sic*] this important goal.”²¹ Nieman responded:

May I ask for clarification?

As you are aware we have had several verbal interactions over the past several weeks about the issues of tenders, primarily in a real estate context, some in person, some by phone, and some in email format. So far as I am aware, my performance directly and/or as to supervision of our third party administrator has been strongly questioned and/or I have received what I perceive as verbal reprimands from you regarding these issues....

If I am being formally or informally reprimanded as to my performance in these matters and/or judgment calls I made as to defense counsel selection of counsel, forgoing or

¹⁴ PPMSD Ex. D.

¹⁵ Declaration of Kenneth Jones (Jones Decl.) ¶ 3.

¹⁶ *Id.*

¹⁷ PPMSD Ex. B.

¹⁸ Nieman Dep. Ex. 3.

¹⁹ Nieman Dep. Ex. 21.

²⁰ *Id.*

²¹ *Id.*

delaying formal cross claims against landlords and/or their insurers, and/or as to settlement of disputed tender actions and underlying claims, and in light of your indications below as to an intention to clarify processes and/or organizational expectations, will I be receiving any type of written reprimand that clarifies the perceived lapses and/or believed violations of company norms and/or fiduciary duties? If so, will I be provided with specific guidance as to the expectations of me going forward?

As an aside, on this very date I received a copy of the amended *Position Statement* as to U.S. EEOC charge 510-2016-0111 / FCHR charge 201600384 from EEOC investigator Melinda Montero. It is my understanding that Ms. Karrenbauer is supervising this matter on behalf of SEG and that she reports directly to you. I am cautiously optimistic that these events are unrelated but believe it is appropriate to note them for the record so there is no misunderstanding and because I believe I have a duty to report any concerns as to potential retaliation and/or hostile work environment aspects of the charge to SEG leadership by way of human resources, and to U.S. EEOC and FCHR.²²

Grimm wrote back: “I’m sorry you feel that way. There is no reprimand and none was intended.”²³

On February 9, 2017, the Department of Labor’s Wage and Hour Division sent a determination letter to Nieman and CEO Ian McLeod.²⁴ It determined that Southeastern committed no violation of immigration law, but specified that the “investigation was limited to the complaint allegations.”²⁵

On March 27, 2017, Jones gave Nieman a copy of his Annual Performance Review Report.²⁶ Nieman received generally positive feedback on his job performance. And, in May 2017,²⁷ Southeastern awarded Nieman a \$1,000 performance bonus.²⁸

In early June, Oliver Smith (Sedgwick employee) forwarded the case file of *Small v. Southeastern Grocers* to Sandy Topkin (Southeastern outside counsel) for review, noting “I don’t think we can tender it, so there’s no rush.”²⁹ One week later, after reviewing the case file, Topkin advised “the lease agreement STRONGLY SUPPORTS a full and complete tender of this matter to the landlord for both defense and indemnity.”³⁰ Later in the email chain, Sandy Grimm sends Nieman an email:

In reviewing this email string it appears the root cause of the failure to recognize the immediate tender is a lack of understanding of basic lease terminology on the part of Oliver Smith, the Sedgwick claims adjuster. As a result we have hired two separate lawyers on a case that could, and should have tendered immediately to the landlord.

²² *Id.*

²³ Nieman Dep. Ex. 22.

²⁴ PPMSD Ex. E.

²⁵ *Id.*

²⁶ PPMSD Ex. I.

²⁷ On his list of exhibits, Nieman represents that this letter is from May 2017. The letter is undated but it states that Nieman was to receive the bonus in June.

²⁸ PPMSD Ex. J.

²⁹ Nieman Dep. Ex. 20.

³⁰ *Id.* (emphasis in the original).

I would like to suggest two things:

1. Have Justin put together a “lunch and learn” on basic lease terminology and common LL tender situations that may not be completely obvious.
2. Tighten up our guidelines on tender requests to include all accidents that occur outside the four walls of the store itself (Justin will likely have some additional suggestions related to the not obvious situations).

Although the time and dollars spent on outside counsel in this situation will be low, by implementing the above recommendations we can avoid the spend [*sic*] and create greater efficiency within your team.³¹

That same day, Nieman wrote a lengthy email to Karen Opp complaining he is “continuing to struggle a bit with [his] reporting relationship as to Sandy Grimm, VP and General Counsel.”³² Nieman expressed his frustration, “it is very difficult functioning in such a demanding job with so much ambiguity as to my role, exact expectations of me by my supervisor, and reporting relationships with [Grimm].”³³ Nieman pointed out that his reporting issues “have occurred in the shadow of a formal EEOC/FCHR charge that [he was] forced to file.”³⁴ He expressed his hope that he was “not being treated adversely based on ... having filed formal regulatory charges.”³⁵ Shortly after Nieman sent the email, Kate Van Coevorden (Human Resources Director) wrote back advising Nieman she would review the email to Opp and respond to his concerns.

On June 11, 2017, Nieman wrote an even longer email to Kate Van Coevorden, largely rehashing the same complaints in the email to Opp, but added more detail to the circumstances surrounding his EEOC/FCHR complaints.³⁶ He complained that after filing the EEOC/FCHR complaints, Ken Jones threatened his employment after a “highly suspect internal investigation (Associate Relations).” He furthermore complained that since October 2015, his role has been “kept very sequestered;” unlike his predecessors, he has not been invited to attend trade meetings or interact with Southeastern’s insurers or actuaries.³⁷ Despite these problems, Nieman advised that when the EEOC issued a right to sue letter, “in an act of utmost good faith” and with the hopes the problems would resolve, he allowed the letter to expire so that he could focus on performing his job at a high level.³⁸ To Nieman’s dismay, the problems had not resolved; he stated “the unresolved question as to exactly what reporting status I have with Mr. Grimm, couple with the extremely distant (and often contentious) relationship I have with Mr. Jones makes each day a bit of a struggle.”³⁹

On June 19, 2017, Oliver Smith sent Sandy Grimm an email requesting authorization to file a third-party complaint against PepsiCo, Inc.⁴⁰ On June 20, 2017, Grimm instructed Smith to

³¹ *Id.*

³² Nieman Dep. Ex. 25.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Nieman Dep. Ex. 15.

send Pepsi a final communication to let them know that Southeastern intended to file the lawsuit the following Monday if Pepsi does not accept the tender by the close of business on Friday. Nieman sent the email chain to Ken Jones stating “here is an example of where Mr. Grimm is giving firm instructions to Sedgwick and is not seeking my input in doing so.”⁴¹ Jones responded dismissively, “I do not see anything in Sandy’s response that indicates we should handle this in a different manner.... At my level, I am not into departmental turf wars (perceived or otherwise) or focused on chain of command vs. doing what’s right for the company.”⁴² Nieman’s response indicated he understood Jones.

On June 21, 2017, Nieman sent very lengthy emails to Scott Haskell (Milliman) and Joe Puelo (AON) complaining about his reporting status to Sandy Grimm.⁴³ On June 23, 2017, Barry Scott (AON) responded to Nieman, and carbon-copied Ken Jones, suggesting that the matter should be handled internally.⁴⁴ Upon reading the email, Jones determined that Nieman should be discharged from employment with Southeastern.⁴⁵ Jones declared “[i]t was completely wrong for [Nieman] to send that email and the accusations about [Grimm] were false.”⁴⁶

On the same day, June 23, 2017, Kate Van Coevorden and Stacy Brink met with Nieman “to follow up on concerns raised by [Nieman] about Sandy Grimm” and address his “chain of command” complaints.⁴⁷ Van Coevorden attempted to relate to Nieman that “the chain of command was far less important than what was best for the company overall.”⁴⁸ Nieman brought up his EEOC/FCHR complaints during the interview but never mentioned his Department of Labor immigration complaint.⁴⁹ At the close of the interview, Van Coevorden determined that Nieman should be terminated.⁵⁰ Later that afternoon, Van Coevorden ran into Sandy Grimm. Van Coevorden told Grimm that she did not believe Nieman should be working for Southeastern any longer.⁵¹ Grimm agreed, and asked Van Coevorden to arrange a meeting with Ken Jones, Brian Carney (Chief Financial Officer) and Steve Strachota (interim Chief Human Resources Officer).⁵² The meeting was scheduled for the following Monday, June 26, 2017.

On Saturday, June 24, 2017, Nieman sent an email to the Department of Labor, and carbon-copied Southeastern’s interim CEO Anthony Hucker,⁵³ requesting “the investigation be reopened and that a suspected whistleblower violation aspect be added.”⁵⁴ Despite the first investigation’s finding that the “majority of the people in question fell under E-3 designation and that their recruitment appeared to be in order,” Nieman informed the Department of Labor he had

⁴¹ *Id.*

⁴² Nieman Dep. Ex. 26.

⁴³ Nieman Dep. Exs. 11, 22.

⁴⁴ Nieman Dep. Ex 28.

⁴⁵ Jones Decl. ¶ 5.

⁴⁶ *Id.*

⁴⁷ Declaration of Kate Van Coevorden (KVC Decl.) ¶¶ 3-4.

⁴⁸ *Id.* ¶ 4.

⁴⁹ KVC Decl. Ex. B; KVC Decl. ¶ 6.

⁵⁰ KVC Decl. ¶ 4. *See also* PP Opp., p. 26 (“[T]he statements and demeanor of Van Coevorden made it clear she was intending to use the process as a basis to try and justify adverse action against Nieman.”).

⁵¹ KVC Decl. ¶ 7; Declaration of M. Sandlin Grimm (Grimm Decl.) ¶ 6.

⁵² KVC Decl. ¶ 7.

⁵³ Nieman states that he carbon-copied Anthony Hucker because he learned that Hucker had sued a previous employer for retaliation and believed he would be sympathetic to his cause. PP Opp., p. 27.

⁵⁴ Nieman Dep. Ex. 7.

“some additional information in hand” and they “may no longer believe it to be true that these hiring actions were proper under U.S. law.”⁵⁵

On Monday, June 26, 2017, Nieman sent an email to Stacy Brink along with the email thread from December 6, 2016 claiming “[t]his is thread that followed the difficult verbal/speakerphone interaction.”⁵⁶ He added:

Mr. Grimm also has been clearly aware of the EEOC/FCHR charges, at least to a degree, based upon (1) his direct command relationship with Monica Karrenbauer, (2) my confirmations of status to him and executive leadership. I believe he was also potentially involved with the U.S. DOL inquiry as to the possible H1B and/or E3 visa violations by SEG as to a number of foreign employees which were recruited to SEG in 2015 and/or 2016, mostly from Australia. I was a participant in those investigations from a DOL perspective as well prior to those interactions and events and have requested that DOL reactivate their investigation based upon my recent interactions with Kate Van Coevorden Farleigh.⁵⁷

Brink responded with confusion about Nieman’s allegation that Grimm knew of the immigration complaint and Nieman’s request for the Department of Labor to reactivate its investigation. Nieman responded, restating the allegations in the earlier email and advised that CEO Anthony Hucker was copied on the request.

Kate Van Coevorden, Sandy Grimm, Ken Jones, Brian Carney, and Steve Strachota met on June 26, 2017 as scheduled.⁵⁸ Kate Van Coevorden, Sandy Grimm, and Ken Jones all recommended to Brian Carney and Steve Strachota that Nieman’s employment be terminated. Van Coevorden opined that Nieman’s “presented such an inflexible demeanor and working style that it didn’t fit within SEG’s work environment.”⁵⁹ Grimm opined that he did not work well with Nieman, noting “he was unwilling or unable to work in a collaborative environment.”⁶⁰ Jones opined that Nieman should be fired for sending the emails to third-party vendors AON and Milliman.⁶¹ After listening to their recommendations, Carney and Strachota agreed with the decision to discharge Nieman.⁶² Nieman’s Department of Labor complaint played no part in their decision to terminate his employment.⁶³ Grimm, Van Coevorden, and Jones did not become aware of the Department of Labor complaint until after Nieman sent the email to Brink and other executives,⁶⁴ and Strachota and Carney could not recall whether they knew about the Department of Labor complaint until July 10, 2017.⁶⁵

⁵⁵ *Id.*

⁵⁶ Nieman Dep. Ex. 27.

⁵⁷ *Id.*

⁵⁸ Declaration of Brian Carney (Carney Decl.) ¶¶ 2-3; Declaration of Steven Strachota (Strachota Decl.) ¶ 2-3; Grimm Decl. ¶ 7; Jones Decl. ¶ 6; KVC Decl. ¶ 8.

⁵⁹ KVC Decl. ¶ 8.

⁶⁰ Grimm Decl. ¶ 7.

⁶¹ Jones Decl. ¶¶ 5-6; KVC Decl. ¶ 8; Grimm Decl. ¶ 7.

⁶² Carney Decl. ¶ 3; Strachota Decl. ¶ 3.

⁶³ Jones Decl. Ex. B; Strachota Decl. ¶ 5; Carney Decl. ¶ 4; Van Coevorden stated Van Coevorden Decl. Ex. B.

⁶⁴ Grimm told the Department of Labor investigators he “did not know there was a complaint because [Southeastern was] never notified that an individual had made a complaint.” Grimm Decl. Ex. A. Jones told the Department of Labor investigators he “was never told about the H1B investigation that took place...in 2016,” and “never had a reason to discuss H1B visas or E3 visas with [Nieman].” Jones Ex. B. Van Coevorden told the Department of Labor

On July 10, 2017, Southeastern terminated Nieman's employment. In a letter from Strachota, the company stated its decision was based on Nieman's poor job performance, his demonstrated lack of judgment in the performance of his duties, making false and defamatory statements to third parties regarding Officers of the Company, and making false statements during an investigation into his recent allegations.⁶⁶ Southeastern furthermore denied there was any evidence Nieman was subject to any retaliation or unfair treatment because of his prior EEOC/FCHR charge. After Strachota delivered the letter, Nieman "was escorted out of the building like a criminal."⁶⁷

After Nieman's termination, he secured employment with Vericclaim, Inc., an affiliate of Sedgwick CMS in late November 2017.⁶⁸ Vericclaim terminated his employment in December 2017 without providing Nieman an explanation.

The Department of Labor investigated Nieman's immigration and retaliation complaints in November 2017.⁶⁹ On May 16, 2018, the Department of Labor's Wage and Hour Division sent a determination letter to Nieman and CEO Anthony Hucker. The Department of Labor determined that Southeastern committed no violation of immigration law.⁷⁰

Standard for Motion for Summary Decision

Pursuant to 29 C.F.R. § 18.72, Respondent filed Motion for Summary Decision. Respondent will succeed on his motion if it shows (1) that there is no genuine dispute as to any material fact, and (2) he is entitled to a decision as a matter of law. 29 C.F.R. § 18.72(a). In assessing whether there is a genuine dispute as to any material fact, I must resolve any ambiguities and factual inference in favor of the non-moving party. *Cobb v. FedEx Corp. Serv.*, ARB No. 16-030, ALJ No. 2010-AIR-024, slip op. at 4 (Sept. 29, 2017) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The INA prohibits an employer from discharging or otherwise discriminating against an employee because he "has disclosed information...that the employee reasonably believes evidences a violation of [8 U.S.C. § 1182(n) or (t); or 20 C.F.R. Part 655, Subparts H and I]," or because he "cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the [labor condition application requirements of the H-1B, H-1B1, or E-3 nonimmigrant programs.]" 8 U.S.C. § 1182(n)(2)(C)(iv); 8 U.S.C. § 1182(t)(3)(C)(iv); *see also* 20 C.F.R. § 655.801(a).

investigators she was handed a copy of the email Nieman sent to Brink on June 26, 2017. Van Coevorden Decl. Ex. A.

⁶⁵ Carney Decl. ¶ 4; Strachota Decl. ¶ 5.

⁶⁶ Nieman Dep. Ex. 29.

⁶⁷ PP Opp., p. 29.

⁶⁸ *Id.* at 37.

⁶⁹ Grimm Decl. Ex. A; Jones Decl. Ex. B; KVC Decl. Ex. A.

⁷⁰ PPMSD, Ex. Z.

LCA whistleblower claims are governed by the *McDonnell Douglas* framework,⁷¹ and because all relevant events surrounding Nieman's complaint took place in Florida, the law of the Eleventh Circuit applies. Under the *McDonnell Douglas* framework, the prosecuting party must first establish a prima facie case of retaliation by demonstrating: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected activity and adverse employment action. *Jones v. Gulf Coast Health Care of Delaware, LLC*, 854 F.3d 1261, 1271 (11th Cir. 2017). If the prosecuting party establishes a prima facie case of retaliation, Respondent must then "articulate a legitimate, nondiscriminatory reason" for taking the adverse action. *Id.* If Respondent meets its burden, the prosecuting party must then show that the supposedly legitimate reason was in fact a pretext designed to mask illegal discrimination. *Id.*

Legal Analysis

I. Procedural Arguments

In his Opposition to Respondent's Motion for Summary Decision, Nieman makes four procedural arguments. First, he argues I should deny summary decision or decline to rule on Respondent's motion because Respondent's motion was untimely. Second, he argues that Respondent has failed to cooperate in discovery, which has severely prejudiced him, and for that reason, granting summary decision would be inappropriate. Third, he argues that the deposition transcript should be stricken because the court reporter failed to follow 29 C.F.R. § 18.64. And fourth, he argues the Declaration of Kate Van Coevorden should be stricken for failure to comply with 28 U.S.C. § 1746.

The Rules provide "a party may file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing." 29 C.F.R. § 18.72(b). The hearing is scheduled for August 20, 2018. Because that deadline fell on a weekend (July 21, 2018), the motion is considered timely if it is filed on the next business day. Respondent sent its Motion for Summary Decision via overnight delivery on July 23, 2018, and it is considered filed on that day (for purpose of timeliness). Thus, Respondent's motion was timely filed. Prosecuting Party has provided no evidence to suggest Respondent has failed to reasonably participate in discovery, and Prosecuting Party's argument is therefore rejected. Prosecuting Party has provided no evidence in support of its assertion that the deposition was defective under 29 C.F.R. § 18.64; that argument is also rejected. Even though Kate Van Coevorden's declaration mentions 28 U.S.C. § 1746(2) (for declarations executed within the United States), instead of § 1746(1) (for declaration executed outside the United States), I find this error insignificant and that Respondent has substantially complied with the statute,⁷² and the declaration will be considered.

II. Adverse Employment Actions Prior to June 24, 2017

Prosecuting Party argues he suffered numerous adverse employment actions during his time with Southeastern, including a "partial constructive discharge" in October 2015, threats

⁷¹ See Order Denying Pending Motions, p. 7, n. 3. Nieman disputes my conclusion that *McDonnell Douglas* applies to LCA whistleblower complaints. See PP Opp., p. 43-55. The arguments are preserved for his near-certain appeal to the Administrative Review Board of this decision.

⁷² The regulations state that "principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence." 20 C.F.R. § 655.825(b).

against his employment by Ken Jones, wrongful denial of promotion, reprimands from Sandy Grimm, among others.

Knowledge is essential to a retaliation complaint because a “decision maker cannot have been motivated to retaliate by something unknown to him.” *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 799 (11th Cir. 2000); *see also Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 11 (Jan. 30, 2004). Southeastern was clearly aware of Nieman’s EEOC/FCHR complaints submitted on October 2, 2015 and November 25, 2015. But, there is no evidence to suggest Southeastern was aware of his April 9, 2016 complaint where he reported alleged violations of immigration law to (incorrectly) EEOC, or his June 26, 2016 complaint to the Department of Labor. Nieman did not carbon-copy any Southeastern employees or executives on the April 9 or June 26 complaint emails. It was not until June 24, 2017 that anyone from Southeastern became aware of Nieman’s immigration complaints. On that day, Nieman emailed the Department of Labor requesting it to reopen the immigration investigation and add retaliation to his complaint, and carbon-copied CEO Anthony Hucker on the email. Many Southeastern employees and executives did not learn about Nieman’s immigration complaints until Nieman’s June 26, 2017 email to Stacy Brink.

In his June 26, 2017 email to Brink, Nieman claimed, “I believe [Sandy Grimm] was also potentially involved with the U.S. DOL inquiry as to the possible H1B and/or E3 visa violations by SEG.” Prosecuting Party’s hunch that Grimm knew about the immigration complaint is insufficient to create a genuine dispute of material fact. *See* 29 C.F.R. § 18.72(c). Sandy Grimm stated he did not become aware of the Department of Labor complaint until after Nieman sent the June 26, 2017 email to Brink. Although it can be reasonably assumed a company’s general counsel would be aware of ongoing legal investigations (such as the Department of Labor’s immigration investigation), there is no evidence to suggest Grimm knew Nieman’s complaint – or any complaint for that matter – triggered the investigation. When the Department of Labor notified Southeastern of the immigration investigation on July 21, 2016, the letter stated Southeastern was “scheduled for investigation.” This phrasing implies a routine investigation, and may be phrased that way to conceal a complainant’s identity in order to protect him from retaliation. It is important to note, however, the February 9, 2017 “no violation” determination letter stated the “investigation was limited to the complaint allegations,” but this fact alone is not enough to contradict Grimm’s assertion he did not become aware of that Nieman was behind any immigration complaint until June 26, 2017.

The undisputed evidence shows Respondent did not become aware of Prosecuting Party’s immigration complaints until June 24, 2017 at the earliest. Respondent could not have possibly taken an adverse action against Prosecuting Party “because” he engaged in protected activity before that date. As such, Respondent is entitled to a decision as a matter of law with respect to all claims of retaliation allegedly occurring prior to June 24, 2017.

III. Termination

Prosecuting Party argues the short time between Respondent discovering his protected activity (June 24, 2017) and his termination is enough to raise an inference of retaliation and survive a motion for summary decision. In many cases, that is correct. *See, e.g., Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). But “when an employer contemplates an adverse employment action before an employee engages in protected activity,

temporal proximity between the protected activity and the subsequent adverse employment action does not suffice to show causation.” *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006).

The undisputed evidence shows Ken Jones, Kate Van Coevorden, and Sandy Grimm had contemplated terminating Nieman on June 23, 2017, three days before they became aware of his immigration complaints.

On Friday, June 23, 2017, Barry Scott of AON responded to Nieman’s email complaining about Sandy Grimm and carbon-copied Ken Jones. Jones read the email and immediately determined Nieman should be fired because he felt it was completely wrong for Nieman to send that email and believed the email contained false accusations about Grimm. On that same day, Kate Van Coevorden met with Nieman to follow up on his concerns about Grimm and address his chain of command concerns. At the end of that meeting, Van Coevorden also determined that Nieman should no longer be working for Southeastern. Later that day, Van Coevorden ran into Sandy Grimm and told him she thought Nieman should be terminated. Grimm agreed, and asked Van Coevorden to arrange a meeting with Ken Jones, Brian Carney, and Steve Strachota the following Monday, June 26, 2017.

Nieman relaunched his immigration complaint with the Department of Labor over the weekend, on June 24, 2017, and then disclosed he was the source of the complaints to Stacy Brink on June 26, 2017. Jones, Van Coevorden, and Grimm did not become aware of Nieman’s immigration complaints until after Nieman sent the email to Brink. Although it is not clear whether Jones, Van Coevorden, or Grimm became aware prior to or after the meeting with Strachota and Carney, there is no evidence to suggest that Nieman’s immigration complaint played any part in the group’s decision to terminate. Indeed, all of the evidence is to the contrary: each participant in the June 26 meeting described it as focused on Nieman’s internal complaints and his inability or unwillingness to be a team player. Jones recommended termination because of Nieman’s emails to Scott Haskell (Milliman) and Joe Puelo (AON). Van Coevorden recommended termination because Nieman “presented such an inflexible demeanor and working style that it didn’t fit within SEG’s work environment.” And, Sandy Grimm recommended termination because he felt he did not work well with Nieman and because Nieman “was unwilling or unable to work in a collaborative environment.” Steve Strachota and Brian Carney based their decisions on the input from Jones, Van Coevorden, and Grimm.

The undisputed evidence shows that Respondent contemplated firing Prosecuting Party before any person involved in the decision was aware that Prosecuting Party had engaged in protected activity. Accordingly, temporal proximity is insufficient to raise an inference of retaliation. Furthermore, Prosecuting Party has failed to submit any evidence beyond the timing to suggest that his immigration complaint played any role in Respondent’s decision to terminate his employment. Accordingly, I find there is no genuine dispute as to any material fact and Respondent is entitled to a decision as a matter of law with respect to Prosecuting Party’s claim of retaliation respecting his termination.

IV. Post-Termination Adverse Actions

Prosecuting Party argues that Respondent took post-termination retaliatory action against him as well. First, he alleges Southeastern filed an “objectively frivolous lawsuit” against him on August 23, 2017. Second, he alleges Southeastern filed an “objectively frivolous” proposal for settlement. And third, he alleges Southeastern convinced his next employer to fire him.

On June 18, 2018, Prosecuting Party filed a Motion to Disqualify Respondent’s Counsel and argued that Respondent’s counsel had acted as instruments for Respondent’s retaliatory conduct. He raises the argument once more in his Opposition to Respondent’s Motion for Summary Decision, even though I summarily rejected this argument in my Order Denying Pending Motions. I will do so again for the same reasons.

Nieman stated he was served with deposition subpoenas in the matters of *Valencia Eve v. Winn-Dixie Stores, Inc.* on August 16, 2017, and *Antoinette Kelly v. Winn-Dixie Stores, Inc.* on August 17, 2017. Nieman, in what he described as an act of utmost good-faith, contacted Respondent’s counsel and advised he was not a proper witness to the cases. Then, Respondent’s counsel filed a motion to enforce a confidentiality covenant and prevent Nieman from disclosing confidential information in the *Valencia Eve* and *Antoinette Kelly* cases. As I stated in my previous Order, and as Nieman is surely aware, none of the allegations raise an inference of retaliation. More specifically, none of the allegations raise an inference of retaliation for reporting possible violations of immigration law.

With respect to his “proposal for settlement” theory of retaliation, Prosecuting Party fails to submit any evidence to suggest Respondent’s proposal was at all related to him reporting violations of immigration law. Nor is there any evidence to suggest that the proposal even qualifies as an adverse employment action. This argument is also rejected.

Although blacklisting a former employee would likely qualify as an adverse employment action under the regulations, *see* 20 C.F.R. § 655.801(a), Prosecuting Party has produced no evidence of such conduct.

Other Motions

As of the date of this Order, there are several motions that have been filed and are pending rulings. Because summary decision will be granted, those motions are rendered moot, and they will be denied on that basis.

In addition, on August 2, 2018, I issued a Preliminary Protective Order in response to Respondent’s emergency motion. In that order, I directed Respondent to provide certain information no later than August 17, 2018. That requirement will be vacated, and the documents that I sealed in the August 2 order will remain sealed.

ORDER

Based on the foregoing, I find that there is no dispute of material facts, and accordingly IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED;
2. The complaint of Complainant Jason L. Nieman under the INA is DENIED;
3. The hearing scheduled to commence on August 20, 2018 in Jacksonville, Florida is CANCELED;
4. All other pending motions are DENIED as moot; and
5. The requirement that Respondent provide information by August 17, 2018, as set forth in the Preliminary Protective Order of August 2, 2018 is VACATED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. Such petition must be received by the Board within 30 calendar days of the date of the decision and order.

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

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. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.