



**Issue Date: 28 September 2018**

CASE NO.: 2018-LCA-00021

*In the Matter of:*

JASON L. NIEMAN,  
*Prosecuting Party,*

v.

SOUTHEASTERN GROCERS, LLC,  
*Respondent.*

**ORDER DENYING RECONSIDERATION**

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 August 3, 2018, I issued an Order Granting Respondent’s Motion for Summary Decision. I determined there was no evidence suggesting Southeastern knew Nieman’s complaint to the Department of Labor’s Wage and Hour Division triggered the investigation into Southeastern’s visa program, and therefore Southeastern could not have possibly fired Nieman for engaging in protected activity. In addition to granting summary decision, I denied all other pending motions as moot, including Prosecuting Party’s motion to compel. On August 7, 2018, Nieman timely filed an Emergency Motion for Reconsideration, arguing (1) I erroneously accepted Respondent’s version of events as undisputed and (2) it was inappropriate to grant summary decision before resolving the discovery disputes. After reconsideration of the evidence of record and the motion to compel, I find no reason to disturb the decision to grant summary decision in favor of Respondent.

**Acceptance of Respondent’s Version of Events as Undisputed**

Nieman argues I erroneously accepted Respondent’s version of events as undisputed, even though he “provided extensive support, including materials from Respondent’s threadbare production of documents, showing that they had contradicted themselves repeatedly in prior statements of interviews.” Prosecuting Party Emergency Motion for Reconsideration, p. 4. Nieman relies heavily on documentary evidence demonstrating there were several instances where Ken Jones and Sandy Grimm praised Nieman for strong job performance. This evidence

contradicts the company’s termination letter, which states Nieman was terminated, in part, for poor job performance.

Granting summary decision is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a). A material fact is that which might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, disputes over irrelevant facts do not preclude an administrative law judge from granting summary decision.

To raise a genuine dispute of material fact and defeat a motion for summary decision, Nieman had to put forth some evidence to suggest that Southeastern knew about the immigration complaints prior to June 23, 2017, the day Kate Van Coevorden, Ken Jones, and Sandy Grimm contemplated firing him. That he did not do. It does not matter there is evidence contradicting the company’s stated reasons for firing him. An employer is permitted to fire an employee for good reason, bad reason, or even no reason at all, so long as that reason is not illegal. *See Jefferson v. Sewon America, Inc.*, 891 F.3d 911, 924 (11th Cir. 2018). In this case, the evidence is insufficient to prove Southeastern fired Nieman for an illegal reason.

### Motion to Compel

Nieman argues “Respondent refused to properly comply with the rules as to discovery, depriving Nieman of key evidence as to their true knowledge (or suspicions) as to Nieman’s protected conduct before the DOL WHD prior to June 24, 2017.” Prosecuting Party Emergency Motion for Reconsideration, p. 7.

The Administrative Review Board and the Benefits Review Board have recognized possible due process implications when summary decision is entered without allowing a party to complete discovery. *E.g.*, *Saporito v. Publix Super Markets, Inc.*, ARB No. 12-109, ALJ No. 2010-CPS-001 (April 30, 2013); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Cornell v. Lockheed Aircraft Int’l*, 23 BRBS 253 (1990).

On July 18, 2018, Nieman filed a 54-page Motion to Compel, seeking an order compelling Respondent to answer interrogatories, produce requested documents, and provide compliant responses to Prosecuting Party’s requests for admission. Nieman served upon Respondent 25 interrogatories, 22 requests for the production of documents, and 191 requests for admissions. The following requests seek information relating to Respondent’s knowledge of Nieman’s immigration complaints:

| Prosecuting Party Discovery Request   | Respondent’s Response   |
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| <p><b>Request for Documents # 9:</b> Any documents, emails, recordings, any other types of communications or materials related to the allegations of the Prosecuting Party that he suffered discrimination, retaliation, defamation, promissory estoppel, fraud or any related causes by virtue of the actions of the officers, agents,</p> | <p>Respondent objects to this Request on the grounds it is overbroad and relates to irrelevant matters and to the extent the request seeks documents protected by the attorney client and work product privileges. Without waiving any objection, <b>Respondent will produce documents</b> pertaining to Prosecuting Party’s employment and</p> |

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| <p>attorneys and/or employees of Respondents at any time from June 15, 2015 to the date of your response, Such items should specifically include any investigations or communications, and those of Spencer Silverglate of Miami.</p>  | <p>termination from employment and termination from employment consistent with the issues in this OALJ proceeding.</p>   |
| <p><b>Request for Documents # 19(c):</b> Any U.S. Department of Labor complaint filed against the Respondents or their subsidiaries. Such materials should include, but not be limited to U.S. Department of Labor Wage and Hour investigation reference number 1795498 as to possible Immigration and Nationality Act violations.</p>   | <p>Respondent objects to this Request on the grounds it is overbroad and relates to irrelevant matters.</p>  |
| <p><b>Interrogatory # 18:</b> Please confirm when respondent first learned and/or suspected that Prosecuting Party Nieman had raised issue and/or requested investigation into the Respondents' hiring and/or foreign visa (H1B, E2, E3, etc.) practices. Your response should specifically identify who learned or suspected, and what actions were taken as to communication that information internally or externally in any way.</p>   | <p>No one suspected that Prosecuting Party complained to the DOL about INA compliance issues. Respondent received two emails from Prosecuting Party (one dated June 24, 2017 and one dated June 26, 2017). These emails identify the first notice to Respondent that Prosecuting Party made any report to the DOL. The contents of the emails speak for themselves. No action was taken following receipt of these emails.</p>   |
| <p><b>Request for Admission # 79/80:</b> Admit that between 4/9/2016 and 2/9/2017 that one or more officers, employees, attorneys, or agents of SEG or affiliates learned that Prosecuting Party Nieman had filed the complaint initiating and/or participated in the U.S. Department of Labor Wage and Hour Division investigation of SEG or affiliates potential improper use of H1B and/or E-3 visa program.</p>  | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, SEG <b>denies</b> the requested admission.</p>  |
| <p><b>Request for Admission # 81:</b> Admit that between 4/9/2016 and 2/9/2017 that one or more officers, employees, attorneys, or agents of SEG or affiliates made one or more communications (verbal, email, or text message) opining that Prosecuting Party Nieman was suspected of having filed the complaint initiating the investigation, and/or participated in the U.S. Department of Labor Wage and Hour Division investigation of SEG or affiliates potential improper use of H1B and/or E-3 visa program.</p> | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds the request is overbroad and unduly burdensome and relates to irrelevant matters to the extent the scope of the request seeks the identification of suspicions of any one of more than 60,000 employees of SEG regarding Prosecuting Party's alleged complaints to the DOL. Without waiving any objection, SEG <b>denies</b> the requested admission to the extent it pertains to any person in the decision to terminate Prosecuting Party's employment.</p> |
| <p><b>Request for Admission # 127:</b> Admit that between June 12, 2017 and June 24, 2017 that one or more communications occurred between SEG officers, employees or attorneys discussing how to justify termination of Nieman's employment.</p>  | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds the request calls for attorney client privileged communications and is therefore improper. Without waiving any objection, and with regard to communications not privileged,</p>   |

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|  | <b>denied</b> that there was any discussion regarding “how to justify termination of Nieman’s employment.”   |
| <b>Request for Admission # 128:</b> Admit that between June 12, 2017 and June 24, 2017 that one or more communications occurred between SEG officers, employees or attorneys as to how to justify termination of Nieman’s employment because he was known or suspected to have participated in one or more U.S. government agency investigations involving Respondent SEG, its affiliates, officers, or employees.                             | SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds the request calls for attorney client privileged communications and is therefore improper, and objects further on the grounds that the request assumes unestablished facts and is therefore compound. Without waiver of any objection, and with regard to communications not privileged, <b>denied</b> . |
| <b>Request for Admission # 129:</b> Admit that between June 12, 2017 and June 24, 2017 that one or more communications occurred between SEG officers, employees or attorneys as to how to justify termination of Nieman’s employment because he was known or suspected to have filed a charge or investigation request with one or more U.S. government agency investigators involving Respondent SEG, its affiliates, officers, or employees. | SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds the request calls for attorney client privileged communications and is therefore improper, and objects further on the grounds that the request assumes unestablished facts. Without waiver of any objection, and with regard to communications not privileged, <b>denied</b> .                           |
| <b>Request for Admission # 130:</b> Admit that on or about June 24, 2017 Respondent SEG’s then Chief Operating Officer Anthony Hucker was expressly informed that Nieman had participated in a U.S. Department of Labor investigation as to Respondent SEG or affiliates H1-B and/or E-3 visa employment practices. (See Request for Admissions Request exhibit C).  | SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, SEG <b>admits</b> the document is dated (Saturday) June 24 but is without knowledge as to whether Prosecuting Party’s email was read that day and therefore is <b>without knowledge</b> as to whether Mr. Hucker was aware of Prosecuting Party’s involvement with the DOL investigation on June 24.         |
| <b>Request for Admission # 131:</b> Admit that on or about June 24, 2017 Respondent SEG’s then Chief Operating Officer Anthony Hucker was expressly informed that Nieman was reactivation of the in a [ <i>sic</i> ] U.S. Department of Labor investigation as to Respondent SEG or affiliates H1-B and/or E-3 visa employment practices.  | SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, SEG <b>admits</b> the document is dated (Saturday) June 24 but is without knowledge as to whether Prosecuting Party’s email was read that day and therefore is <b>without knowledge</b> as to whether Mr. Hucker was aware of Prosecuting Party’s involvement with the DOL investigation on June 24.         |
| <b>Request for Admission # 132:</b> Admit that on or about June 26, 2017 Respondent SEG’s manager of associate relations (Stacy Brink) was expressly informed that Nieman had participated in a U.S. Department of Labor investigation as to Respondent SEG or affiliates H1-B and/or E-3 visa employment practices. (See Request for Admissions Request exhibit C).   | SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, SEG <b>admits</b> that Stacy Brink received the referenced email on June 26, 2017.   |

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| <p><b>Request for Admission # 133:</b> Admit that on or about June 26, 2017 Respondent SEG's manager of associate relations (Stacy Brink) was expressly informed that Nieman was requesting a reactivation of the in a [<i>sic</i>] U.S. Department of Labor investigation as to Respondent SEG or affiliates H1-B and/or E-3 visa employment practices.</p> | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, <b>SEG admits</b> that Stacy Brink received the referenced email on June 26, 2017.</p>   |
| <p><b>Request for Admission # 134:</b> Admit that between June 24, 2017 and July 10, 2017 Anthony Hucker informed then CEO Ian McLeod of Nieman's actions and/or complaints.</p>   | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG. Without waiving any objection, <b>denied.</b></p>   |
| <p><b>Request for Admission # 136:</b> Admit that between June 24, 2017 and July 10, 2017 then CEO Ian McLeod ordered Nieman's termination of employment because he was known to have filed a charge or investigation with one or more U.S. government agency investigations involving Respondent SEG, its affiliates, officers, or employees.</p>           | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds that request seeks facts not established and is therefore compound, vague and confusing. Without waiving any objection, <b>denied.</b></p> |
| <p><b>Request for Admission # 137:</b> Admit that between June 24, 2017 and July 10, 2017 then CEO Ian McLeod ordered Nieman's termination of employment because he was known or to have participated [<i>sic</i>] in one or more U.S. government agency investigations involving Respondent SEG, its affiliates, officers, or employees.</p>                | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds that request seeks facts not established and is therefore compound, vague and confusing. Without waiving any objection, <b>denied.</b></p> |
| <p><b>Request for Admission # 139:</b> Admit that between June 24, 2017 and July 10, 2017 Anthony Hucker ordered Nieman's termination of employment because he was known to have filed a charge or investigation request with one or more U.S. government agency investigations involving Respondent SEG, its affiliates, officers, or employees.</p>        | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds that request seeks facts not established and is therefore compound, vague and confusing. Without waiving any objection, <b>denied.</b></p> |
| <p><b>Request for Admission # 140:</b> Admit that between June 24, 2017 and July 10, 2017 Anthony Hucker ordered Nieman's termination of employment because he was known or to have participated [<i>sic</i>] in one or more U.S. government agency investigations involving Respondent SEG, its affiliates, officers, or employees.</p>                     | <p>SEG objects to this request on the grounds that the request seeks information from Hale/ISG who is unknown to SEG, and objects further on the grounds that request seeks facts not established and is therefore compound, vague and confusing. Without waiving any objection, <b>denied.</b></p> |

I find Respondent provided adequate responses to each of these discovery requests, except Request for Documents # 19(c). I would have overruled the relevance objection. However, there is no evidence to suggest the Department of Labor ever filed a complaint against Southeastern related to Nieman's requests to investigate Southeastern's visa sponsorship program. The request for documents was speculative and ultimately would not have aided Nieman in proving Southeastern knew his complaint triggered the investigation. *See Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ No. 95-CAA-20, slip op. at 11 (Sept. 30, 1999) ("Discovery would not have changed the speculative basis of Complainants' assertion that

they engaged in activity protected by the CAA, SWDA, SDWA, or CERCLA.”). I reject Prosecuting Party’s argument and conclude Respondent reasonably participated in discovery.

**Conclusion**

After reconsideration of all the evidence in the record and the motion to compel, I conclude there is no evidence that would raise a genuine dispute as to any material facts, nor would a ruling on the motion to compel have aided Nieman in discovering such evidence. Accordingly, Prosecuting Party’s motion for reconsideration is denied.

**ORDER**

In light of the foregoing, IT IS ORDERED Prosecuting Party’s Emergency Motion for Reconsideration is DENIED.

**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](mailto: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.