U.S. Department of Labor

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

In the Matter of:

JASON L. NIEMAN,

COMPLAINANT,

v.

SOUTHEASTERN GROCERS, LLC,

RESPONDENT.

ARB CASE NO. 2018-0058

ALJ CASE NO. 2018-LCA-00021

DATE: October 5, 2020

Appearances:

For the Complainant:
Jason L. Nieman; *pro se*; Fruit Cove, Florida

For the Respondent:
David S. Shankman; *Shankman Leone, P.A.*; Tampa, Florida

Before: Thomas H. Burrell, Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provision of the Immigration and Nationality Act (INA or the Act).[1] Jason L. Nieman filed a complaint with the United States Department of Labor's (DOL) Wage and Hour Division (Wage and Hour), asserting that his employer, Southeastern Grocers, LLC (SEG), violated the INA by retaliating against him for filing complaints with the DOL concerning SEG's H-1B nonimmigrant employment practices. On August 3, 2018, a Department of Labor Administrative Law Judge (ALJ) entered summary decision in favor of SEG. Nieman has appealed the ALJ's decision. For the following reasons, we affirm the ALJ.

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[1] 8 U.S.C. § 1182(n)(2)(C)(iv) (2013); 20 C.F.R. § 655.801 (2020).

BACKGROUND

1. Factual Background

SEG hired Nieman in 2015 as a "Senior Manager, Liability Claims."[2] Nieman helped SEG manage claims and lawsuits filed against it for premises liability and incidents and injuries occurring at SEG's stores.[3] Nieman reported to Kenneth Jones, SEG's Treasurer.[4] Sandlin Grimm served as SEG's General Counsel.[5]

Nieman's employment with SEG was tumultuous. Between October 2015 and October 2016, Nieman filed three complaints against SEG with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination and retaliation.[6] Nieman made SEG aware of his EEOC activity and even referred to his EEOC complaints on occasion when complaining internally about actions that he thought might be additional forms of retaliation.[7] The EEOC ultimately determined that it could not conclude from its investigation that violations had occurred.[8]

On June 26, 2016, Nieman also filed a complaint with the DOL alleging that SEG was violating the INA's requirements regarding employment practices for H-1B nonimmigrants.[9] In contrast to his EEOC complaints, Nieman did not notify

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[2] Complainant's Motion for Summary Decision Exhibit (CSDX) A. SEG promoted Nieman to Director of Claims Management on July 7, 2016. CSDX B.

[3] *See* Complainant's Opposition to Respondent's Motion for Summary Decision (Compl. Opp.) Exhibit (COSDX) D at 5-6; CSDX I.

[4] CSDX I; Declaration of Kenneth Jones (Jones Decl.), attached to Respondent's Motion for Summary Decision (Resp. Mot.), at ¶1.

[5] Declaration of Sandlin Grimm (Grimm Decl.), attached to Resp. Mot., at ¶1.

[6] Deposition of Complainant Jason L. Nieman (Compl. Dep.) Exhibits (CDX) 8, 9, 18, attached to Resp. Mot. Nieman's EEOC claims accused SEG of unlawfully denying him promotions, partially constructively discharging him, conducting a pretextual investigation into accusations made against him by one of SEG's vendors, subjecting him to a hostile work environment, denying him opportunities for "organizational and external owner/partner interaction," and artificially reducing his annual performance rating.

[7] CDX 21, 25, 30; CSDX E.

[8] CSDX G.

[9] CDX 6. The INA permits employers to hire nonimmigrant alien workers in specialty occupations to temporarily work in the United States under what is known as an H-1B visa. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. Participation in the H-1B program is subject to certain conditions and obligations on the part of the employer. *See, e.g.,* 20 C.F.R. §§ 655.731–.739. On April 9, 2016, Neiman sent an email alerting the EEOC to his H-1B concerns. CSDX C. In his Opposition to SEG's Motion for Summary Decision, Nieman

SEG that he had filed the DOL complaint.[10] In fact, Nieman asked the DOL to keep his identity confidential.[11]

Wage and Hour investigated SEG's H-1B practices.[12] In its initial investigation letter to SEG dated July 21, 2016, Wage and Hour did not make reference to Nieman or indicate that the investigation was in response to a complaint. Instead, the letter stated only that SEG "has been scheduled for investigation . . . ."[13] Wage and Hour issued a determination letter on February 9, 2017, stating that it determined that SEG had not committed a violation.[14] The determination letter stated that the "investigation was limited to the complaint allegations," but did not elaborate on the complaint or identify Nieman as the complainant.[15]

Amidst these many complaints, Nieman was often at odds with Grimm regarding Grimm's involvement in claims operations and processes.[16] Nieman had no technical reporting relationship with Grimm and became concerned with what he perceived as Grimm's increasing involvement in the processes, demands Grimm was making of Nieman, and Grimm's alleged abusive conduct.[17]

On June 9 and 11, 2017, Nieman shared his concerns about Grimm with human resources representatives.[18] Nieman expressed his belief that he had to follow a strict chain of command, complained about his confusion over Grimm's involvement in the claims processes, and shared his frustrations over perceived ambiguity in his reporting relationships with Grimm and Jones.[19] Nieman also identified what he perceived as aggressive or hostile behavior from Jones and Grimm and expressed his hope that that this behavior was not a result of Nieman

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stated that the EEOC responded that it was not the proper agency for raising such concerns, which prompted him to file his complaint with the DOL. Compl. Opp. at 3.

10 *See* Compl. Dep. at 96.

11 CDX 6.

12 *See* CDX 3.

13 *Id.*

14 CDX 4.

15 *Id.*

16 *See* CSDX V at 3-4; CDX 25.

17 *See, e.g.,* CSDX V at 3-4; CDX 15, 21, 22, 23, 25; Compl. Dep. at 318, 325, 421-22.

18 CDX 25.

19 *Id.*

"having previously raised issue [sic] internally and/or having filed formal regulatory charges" concerning his EEOC complaints.[20]

Kate Van Coevorden, the Senior Director for Human Resources, and Stacy Brink, another human resources representative, met with Nieman on June 23, 2017, to discuss his concerns.[21] Van Coevorden stated that she tried to convey to Nieman the need to work in a collaborative environment, rather than focus on a strict chain of command, to achieve the best results for the company.[22] Van Coevorden declared that by the end of the meeting, she was convinced that Nieman would not be able to let go of his need for a strict chain of command and that he should no longer work for SEG.[23]

After leaving the meeting, Van Coevorden shared her concerns regarding Nieman with Grimm.[24] Grimm stated that he agreed that SEG should terminate Nieman's employment.[25] He suggested that Van Coevorden, Grimm, Jones, Chief Financial Officer Brian Carney, and Interim Chief Human Resources Officer Steve Strachota should meet on June 26, 2017, to discuss Nieman.[26]

Jones stated that he also independently decided on June 23, 2017, that SEG should terminate Nieman's employment.[27] On June 20, Jones told Nieman that he wanted Nieman to work collaboratively with Grimm and his team, and that Jones was "not into departmental turf wars (perceived or otherwise) or focused on chain of command vs. doing what's right for the company."[28] On June 21, Nieman emailed two vendors regarding his concerns with the chain of command, Grimm's involvement in the claims and tender processes, and the lack of clarity surrounding Grimm's authority.[29] Learning of the emails on June 23, Jones stated that he

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20 *Id.*

21 Declaration of Kate Van Coevorden (Van Coevorden Decl.), attached to Resp. Mot., at ¶¶3-5, and Exhibits A and B attached thereto.

22 *Id.* at ¶4.

23 *Id.*

24 *Id.* at ¶7

25 Grimm Decl. at ¶5.

26 Grimm Decl. at ¶6; Van Coevorden Decl. at ¶7. June 23, 2017 was a Friday. June 26, 2017 was the following Monday.

27 Jones Decl. at ¶5.

28 CDX 22.

29 CDX 11, 12.

believed it was "completely wrong" for Nieman to send the emails to the vendors and determined then that SEG should terminate Nieman's employment.[30]

Importantly, Van Coevorden, Grimm, and Jones all declared that they did not know Nieman was behind the Wage and Hour investigation or that he had filed a DOL complaint when they reached their decisions that SEG should terminate his employment.[31]

On June 24, 2017, Nieman sent an email to the DOL, with a copy to SEG's Chief Executive Officer. In that email, he expressed that he believed SEG was likely "re-commencing" its efforts to force him out of the company because of his earlier EEOC activity, based on his meeting with Van Coevorden.[32] He also stated that he had a "good faith basis to believe that SEG now knows or suspects that I was the one who advised DOL of my concerns about the company's immigration visa sponsorship and hiring practices that were previously investigated."[33] Nieman did not say how he had formed this "good faith basis."[34] The June 24, 2017 email was the first time Nieman made SEG aware that he had filed the earlier DOL complaint.[35] Nieman also sent emails to Brink on June 26, 2017, which alerted her to the fact that he had been behind the earlier Wage and Hour investigation and that he had asked the DOL to reactivate their investigation based on his recent interactions with Van Coevorden.[36]

Van Coevorden, Grimm, Jones, Carney, and Strachota met on June 26, 2017.[37] According to the participants, Van Coevorden, Grimm, and Jones presented

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30 Jones Decl. at ¶5; CDX 28.

31 *See* Exhibit A to Van Coevorden Decl.; Exhibit A to Grimm Decl.; Exhibit B to Jones Decl.

32 CSDX M.

33 *Id.*

34 *See id.*

35 *See* Nieman Dep. at 96.

36 CDX 27.

37 Van Coevorden Decl. at ¶8; Grimm Decl; at ¶7; Jones Decl. at ¶6; Declaration of Brian Carney (Carney Decl.), attached to Resp. Mot., at ¶2; Declaration of Steven Strachota (Strachota Decl.), attached to Resp. Mot., at ¶2. It is not clear from the record whether the participants knew about Nieman's June 24 and 26, 2017 emails before the meeting. Grimm, Van Coevorden, and Jones all acknowledged that they learned of Nieman's emails to Brink at some point, but are not clear as to when. Exhibit A to Van Coevorden Decl.; Exhibit A to Grimm Decl.; Exhibit B to Jones Decl. Strachota and Carney declared that could not recall whether they knew before July 10, 2017, the day SEG terminated Nieman's employment, that Nieman had notified SEG of his DOL complaints. Carney Decl. at ¶4; Strachota Decl. at ¶5.

their recommendations that Nieman's employment should be terminated.[38] Carney and Strachota concurred with their recommendations, but Grimm suggested that the decision should be delayed until Brink could complete and document her investigation of Nieman's complaint.[39] Brink subsequently concluded that Nieman's allegations were unsubstantiated and SEG terminated Nieman's employment on July 10, 2017.[40]

According to Nieman, the pattern of abuse did not stop there. Nieman asserts that after his termination, SEG initiated a frivolous lawsuit against him and served him with an improper and invalid proposal for settlement in another action he had filed against SEG in state court.[41] In addition, Nieman claims that after he obtained new employment with a company affiliated with one of SEG's close vendors, he was suddenly terminated after approximately one month on the job at the "direct[ion] or encourage[ment]" of SEG.[42]

2. Procedural History

After investigating Nieman's claims, Wage and Hour determined that SEG had not terminated Nieman's employment for his DOL complaints or his role in initiating the Wage and Hour investigation. Nieman requested a hearing with the DOL's Office of Administrative Law Judges.

Before the ALJ, the parties submitted numerous pre-hearing motions, including a Motion for Summary Decision from Nieman, which were denied by order dated July 2, 2018. Nieman subsequently filed a Motion to Compel, arguing that SEG had failed to properly and completely respond to his discovery requests. SEG then filed its own Motion for Summary Decision, which the ALJ granted on August 3, 2018.

The ALJ separately considered three categories of alleged adverse action in the D. & O.—pre-termination conduct, the termination of Nieman's employment, and post-termination conduct—and dismissed each. With respect to the pre-termination conduct and the termination of Nieman's employment, the ALJ concluded that Nieman had failed to present any evidence that SEG was aware of Nieman's DOL complaints before SEG took, or contemplated taking, adverse action

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38 Van Coevorden Decl. at ¶¶8-9; Grimm Decl.; at ¶7; Jones Decl. at ¶6; Carney Decl. at ¶¶2-3; Strachota Decl. at ¶¶2-3.

39 Van Coevorden Decl. at ¶9; Grimm Decl.; at ¶8; Jones Decl. at ¶6; Carney Decl. at ¶3; Strachota Decl. at ¶3.

40 COSDX M at 1-3; CDX 29.

41 Compl. Opp. at 33-38.

42 *Id.* at 37.

against him. Accordingly, Nieman could not prove causation, which is an essential element of his claim. Regarding the post-termination conduct, the ALJ concluded that Nieman had failed to present any evidence that his DOL complaints had caused the alleged frivolous lawsuit or the improper proposal for settlement. The ALJ also concluded that Nieman had failed to present any evidence that SEG actually interfered with or caused the termination from his subsequent employment. The ALJ therefore dismissed Nieman's case and rejected all other pending motions, including the Motion to Compel, as moot.

Nieman then filed a Motion for Reconsideration. He argued that the ALJ had improperly accepted SEG's asserted facts as true, even though they were in dispute, and that summary decision was premature given SEG's failure to properly participate in discovery. The ALJ denied Nieman's Motion for Reconsideration on September 28, 2018. The ALJ reconfirmed that it was undisputed that SEG had no knowledge of his protected activity before deciding to terminate his employment, which rendered any other disputed facts immaterial to the outcome of the case. The ALJ also revisited Nieman's Motion to Compel and discovery arguments. The ALJ concluded that the requests concerning the issues relevant to the entry of summary decision had been answered to satisfaction or were speculative.

This appeal followed.[43] The Board specified the following issues for review:

1. Did the Administrative Law Judge properly grant the Respondent's motion for summary decision?

2. Did the Administrative Law Judge properly deny Nieman's complaint?

3. Did the Administrative Law Judge properly cancel the hearing, denying and/or deeming moot related motions?

4. Did the Administrative Law Judge properly reject the Prosecuting Party's motion to compel?

5. Did the Administrative Law Judge properly deny the Prosecuting Party's Motion for Reconsideration?

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[43] After the D. & O. was issued on August 3, 2018, Nieman filed a Petition for Review and an Opening Brief with the Board on August 6, 2018, and August 26, 2018, respectively. Despite the appeal, Nieman filed a Motion for Reconsideration with the ALJ on August 7, 2018, which the ALJ denied on September 28, 2018. Nieman then filed a new Petition for Review and "Amended Opening Brief" on October 6, 2018, and October 28, 2018, respectively. As the Board noted in the Notice of Intent to Review, we consider the original Petition for Review and Opening Brief premature, in light of the Motion for Reconsideration. Substantively, however, both Petitions and both Opening Briefs are very similar and proffer nearly identical arguments.

After this appeal was filed and briefed, SEG moved to have this case dismissed based on a settlement agreement reached between the parties in a separate state court action.[44]

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C. § 1182(n)(2) and 20 C.F.R. § 655.845.[45] Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions de novo.[46]

The Board also reviews an ALJ's grant of summary decision de novo.[47] Under the regulations governing the entry of summary decision, judgment must be entered if the pleadings, affidavits, material obtained in discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[48] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party, and the ALJ may not weigh the evidence or determine the truth of the matter.[49]

If the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[50] The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which he would bear the ultimate burden of proof.[51] If the non-moving party fails to demonstrate an element

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44 SEG submitted a letter on November 13, 2019, notifying the Board of the settlement and stating its belief that the settlement resolved the appeal. At the Board's request, the parties submitted additional briefing on the issue.

45 *See also* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

46 *Lubary v. El Floridita*, ARB No. 2010-0137, 2010-LCA-00020, slip op. at 5 (ARB Apr. 30, 2012).

47 *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 2 (ARB Feb. 14, 2017).

48 29 C.F.R. § 18.72.

49 *Vudhamari v. Advent Global Solutions*, ARB No. 2019-0061, ALJ No. 2018-LCA-00022, slip op. at 3 (ARB July 30, 2020).

50 *Kersten v. Lagard, Inc.*, ARB No. 2006-0111, ALJ No. 2005-LCA-00017, slip op. at 6 (ARB Oct. 17, 2008).

51 *Id.*

essential to his case, there can be "no genuine issue as to any material fact," because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[52]

DISCUSSION

1. The Parties' Settlement of a State Court Case Does Not Bar this Action

As Nieman pursued this administrative action, he concurrently pursued an action against SEG and other defendants in the Circuit Court for Duval County, Florida (the State Litigation).[53] Among other things, the State Litigation included a claim under a Florida whistleblower statute which, like the present INA claim, asserted that SEG unlawfully terminated Nieman's employment and retaliated against him because of his complaints to the DOL regarding SEG's visa practices.[54] The parties settled the State Litigation on October 26, 2019, and Nieman voluntarily dismissed the State Litigation with prejudice on November 6, 2019.[55]

SEG argues that the settlement released Nieman's INA retaliation claim pending in front of the ARB. Neither party has addressed whether the Board has the power or authority to enforce this settlement agreement, which was reached independently as part of a state court proceeding. Assuming that the Board would have the power to enforce the agreement in these circumstances, we would conclude that the agreement does not bar Nieman's INA claim. The settlement document provided, in relevant part: (1) that it "is intended to resolve any and all claims brought by Plaintiff J.L. Nieman in Case Number 16-2017-CA-004428 against Defendants Southeastern Grocers, Inc., . . ."; (2) that "[t]he claims to be resolved by this Proposal include all claims asserted by J.L. Nieman in Case Number 16-2017-CA-004428 . . ."; and (3) that "[b]y accepting this Proposal for Settlement J.L. Nieman also agrees to dismiss with prejudice all claims asserted in Case Number

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[52] *Id.* (quoting *Seetharaman v. Gen. Elec. Co.*, ARB No. 2003-0029, ALJ No. 2002-CAA-00021, slip op. at 4 (ARB May 28, 2004)).

[53] *See* Plaintiff's 4th Amended Complaint and Jury Demand (State Complaint), attached as Exhibit F to Respondent's Brief of Points and Authorities in Support of Dismissal of Appeal (Resp. Dismissal Br.).

[54] *See* Count I of the State Complaint, brought under FLA. STAT. § 448.102.

[55] All Defendant's Proposal for Settlement to Plaintiff (Proposal for Settlement), attached as Exhibit G to Resp. Dismissal Br.; Plaintiff's Notice of Acceptance of All Defendant's Proposal for Settlement to Plaintiff of October 25, 2019, attached as Exhibit H to Resp. Dismissal Br.; Plaintiff Nieman's Notice of Voluntary Dismissal with Prejudice, attached as Exhibit I to Resp. Dismissal Br. The case was settled pursuant to Florida Rule of Civil Procedure 1.442 and Florida Statute § 768.79. These rules provide a procedural mechanism for settlement proposals which, if rejected, may shift the burden of paying the offeror's attorney's fees to the offeree.

16-2017-CA-004428 against Defendants Southeastern Grocers, Inc., ..."[56] As this language reflects, the settlement document referred to and released only the claims brought in the State Litigation, specifically. It was not phrased as a general release, nor did it make reference to this administrative action or Nieman's INA claim.

SEG also argues that this appeal should be dismissed under the doctrine of res judicata because the State Litigation whistleblower claim and the INA retaliation claim arise from the same set of operative facts. Under the doctrine of res judicata, a final judgment in one action may bar the parties from re-litigating the same cause of action or a cause of action arising out of the same nucleus of operative facts that were pursued in the first case.[57] However, an essential element of the defense of res judicata is that the first court could have exercised jurisdiction over the claim that is sought to be barred in the subsequent action.[58]

The Circuit Court for Duval County, Florida, in which the State Litigation was adjudicated, would not have had jurisdiction over the INA retaliation claim presented here. The INA gives the Secretary of Labor jurisdiction to investigate and adjudicate INA retaliation claims.[59] Adjudicatory hearings are held by the DOL's Office of Administrative Law Judges,[60] and appeals are taken by the Board[61] and then the appropriate federal district court.[62] Because Nieman could not have successfully raised his INA retaliation claim in the State Litigation, he is not precluded by res judicata from pursuing the INA claim here.[63]

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[56] Proposal for Settlement at 1-2.

[57] *Piper Aircraft Corp. v. Teledyne Indus., Inc.*, 244 F.3d 1289, 1296-97 (11th Cir. 2001); *Abbs v. Con-Way Freight, Inc.*, ARB No. 2008-0017, ALJ No. 2007-STA-00037, slip op. at 7 (ARB July 27, 2010).

[58] *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1392-93 (11th Cir. 1996); *Abbs*, ARB No. 08-0017, slip op. at 8; *Kosciuk v. Consumers Power Co.*, 1990-ERA-00056, 1994 WL 897330, at *1-2 (Sec'y Mar. 31, 1994).

[59] 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.805(a)(13).

[60] 20 C.F.R. § 655.820.

[61] 20 C.F.R. § 655.845.

[62] 5 U.S.C. §§ 702, 704.

[63] It is not clear if SEG is also asserting issue preclusion. Issue preclusion prevents a party from re-litigating an issue actually and necessarily determined by a court in a prior action, even if raised subsequently in the context of a different claim. *Abbs*, ARB No. 08-0017, slip op. at 9. SEG has failed to demonstrate that the State Litigation "actually litigated" the matters at issue here. *See Arizona v. California*, 530 U.S. 392, 414 (2000); *EEOC v. Jacksonville Shipyards, Inc.*, 696 F. Supp. 1438, 1442 (M.D. Fla. 1988); *Liachoff v. Marien*, 376 So. 2d 468, 470-71 (Fla. Dist. Ct. App. 1979).

2. The ALJ Properly Entered Summary Decision for SEG

The INA protects employees who disclose information to an H-1B employer, or to any other person, "that the employee reasonably believes evidences a violation" of the INA's H-1B provisions. The Act also protects employees who cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of the H-1B program. H-1B employers may not "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate" against the employee because he has engaged in such protected activity.[64]

Nieman asserted that SEG violated the INA by retaliating against him for filing the June 2016 and June 2017 DOL complaints and causing the Wage and Hour investigation. As set forth above, the ALJ entered summary decision for each of the three categories of adverse actions alleged to have been taken by SEG—pre-termination conduct, the termination of Nieman's employment, and post-termination conduct. For the reasons set forth below, we agree with the ALJ and affirm the entry of summary decision in SEG's favor.

A. SEG's Citation to the Wrong Statute

As noted, this case arises under 8 U.S.C. § 1182(n)(2)(C)(iv). In its Motion for Summary Decision, SEG cited a different immigration-related whistleblower statute, 8 U.S.C. § 1324b.[65] Nieman argues that the ALJ's decision to grant summary decision was an improper sua sponte action in light of SEG's erroneous citation.[66]

Nieman does not argue that he lacked notice of the true nature of SEG's motion or that he did not have the opportunity to respond because of the citation error.[67] Despite the citation error, SEG made substantive arguments that matched the correct statute. Nieman also cited to, and made arguments applicable to, the correct statute in his Opposition. There is also no indication the ALJ was led astray by SEG's erroneous citation or that the citation had any impact on the arguments, analysis, or outcome in the proceedings below. Absent any showing of lack of notice, lack of opportunity to respond, or unfair prejudice or disadvantage to Nieman, we conclude the ALJ did not err by considering summary decision under the correct statute.

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64 8 U.S.C. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801.

65 Resp. Mot. at 19. The statute SEG cited prohibits conduct intended to impede an employee's right to file a complaint of national origin or citizenship discrimination.

66 Complainant's Amended Initial Brief (Compl. Am. Br.) at 15.

67 *See* 29 C.F.R. § 18.72(f).

B. The Causation Standard Under 8 U.S.C. § 1182(n)(2)(C)(iv)

The INA provides that an H-1B employer may not discriminate against an employee "because" the employee has engaged in conduct protected by the Act.[68] Unlike some statutes that fall within the Board's jurisdiction, the INA and its implementing regulations do not prescribe what causation standard applies to a whistleblower claim.[69] The ALJ applied the "but-for" causation standard.[70] This standard puts the burden on Nieman to prove that but-for his protected activity, SEG would not have taken adverse action against him. Nieman asserts this was in error. He argues the Board should instead apply the lower motivating factor causation standard to the INA.[71] Under this standard, Nieman would only have to prove that his protected activity was a motivating factor in the adverse conduct, even if other, legitimate factors also motivated the conduct.[72]

In 2007, the Board adopted the motivating factor standard for INA retaliation claims in *Talukdar v. U.S. Dep't of Veterans Affairs*.[73] As the Board explained in that case, we have traditionally found that an employer acts "because" of protected activity when it is motivated by that activity, absent congressional indication that a different causation standard applies.[74] This approach was consistent with the use of the motivating factor standard in the analogous Environmental Acts.[75] It was also consistent with the plurality decision of the

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68 8 U.S.C. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801.

69 *Compare* 20 C.F.R. § 655.801 *with, e.g.,* 29 C.F.R. §24.109(b).

70 Although the ALJ did not specifically refer to the but-for causation standard in the D. & O., he did adopt the but-for causation standard explicitly in his earlier order denying Nieman's Motion for Summary Decision. July 2, 2018 Order Denying Pending Motions at 8. In addition, in the D. & O., the ALJ applied the burden-shifting framework adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, which is a framework applied in but-for cases. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-47 (1989).

71 Compl. Am. Br. at 15-18.

72 *See Mackowiak v. Univ. Nuclear Sys. Inc.,* 735 F.2d 1159, 1163-64 (9th Cir. 1984) (ERA case); *Bryant v. Ebasco Servs., Inc.*, 1988-ERA-00031, 1994 WL 897302, at *2 (Sec'y Apr. 21, 1994).

73 ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op at 11 n.10 (ARB Jan. 31, 2007).

74 *Id.*

75 *See* 29 C.F.R. §24.109(b)(2) (applying the motivating factor standard to the whistleblower protection provisions of the Safe Water Drinking Act (42 U.S.C. § 300j-9(i)), the Federal Water Pollution Control Act (33 U.S.C. § 1367), the Toxic Substances Control Act (15 U.S.C. § 2622), the Solid Waste Disposal Act (42 U.S.C. § 6971), the Clean Air Act

Supreme Court in *Price Waterhouse v. Hopkins*, which adopted the motivating factor standard for Title VII discrimination claims.[76]

In 2009, the Supreme Court considered the appropriate causation standard for claims brought under the Age Discrimination in Employment Act (ADEA) in *Gross v. FBL Financial Services, Inc.*[77] The ADEA prohibits an employer from taking adverse action against an employee "because of" such individual's age.[78] The Supreme Court rejected the application of a motivating factor standard, instead reading the "because of" language of the ADEA to require but-for causation.[79] The Supreme Court reached the same conclusion with respect to Title VII's anti-retaliation provision four years later in *University of Texas Southwestern Medical Center v. Nassar*.[80]

Despite the Supreme Court's application of the but-for standard for other discrimination and retaliation statutes, the DOL reconfirmed in 2009 that the motivating factor standard would continue to apply in Environmental Acts cases.[81] Post-*Gross* and post-*Nassar*, federal courts have also deferred to the DOL's application of the motivating factor standard in the context of another statute, the Family and Medical Leave Act.[82]

We have not yet addressed what impact or applicability *Gross* and *Nassar* have on the causation standard for INA retaliation claims.[83] Although many

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(42 U.S.C. § 7622), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9610)).

76 490 U.S. at 258.

77 557 U.S. 167 (2009).

78 29 U.S.C. § 623(a).

79 *Gross*, 557 U.S. at 180.

80 570 U.S. 338, 362 (2013).

81 Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 76 Fed. Reg. 2808, 2811-12 (Jan. 18, 2011); *see also DeKalb Cnty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1021-22 (11th Cir. 2016).

82 *Woods v. Start Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 168-69 (2d Cir. 2017); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 272-73 (3d Cir. 2017).

83 In *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 2012-0049, ALJ No. 2011-LCA-00045 (ARB May 29, 2014), a post-*Gross* and post-*Nassar* case, the Board reviewed a case that involved the issue of the correct causation standards for INA retaliation cases. The ALJ was not clear what standard he had applied. He referenced the "precedent developed in retaliation cases under Title VII," which, post-*Nassar*, requires but-for causation. He also stated that he applied the standards applicable to the "employee-protection provisions contained in the nuclear and environmental whistleblower statutes administered by the

developments in the law since the Board decided *Talukdar* in 2007 may require the Board to eventually revisit the issue, we need not do so today. The ALJ resolved this case by concluding that Nieman failed to proffer any evidence that SEG knew about his protected activity before taking or contemplating adverse action against him. The employer's lack of knowledge of the employee's protected activity is fatal to a whistleblower claim under either the motivating factor standard or the but-for standard.[84] By definition, an employer cannot act "because" of conduct of which it is not aware, no matter what causation standard applies.

As explained below, we agree with the ALJ that Nieman failed to provide evidence that SEG knew about his DOL complaints before SEG engaged in the alleged adverse conduct. Therefore, we would affirm the ALJ under the motivating-factor standard or the but-for standard.

C. Pre-Termination Conduct

In the proceedings below, Nieman referred to a host of adverse conduct that he alleged occurred in the months and years leading up to the termination of his employment with SEG.[85] Similarly, on appeal Nieman makes reference to "an extensive history of suspect, retaliatory, and in some cases almost assuredly illegal conduct . . . ."[86] We agree with the ALJ that Nieman did not present any evidence to

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DOL," which encompass contributing factor causation for the ERA and motivating factor causation for the other Environmental Acts. The Board declined to opine on the causation issue, finding that the ALJ's opinion was unreviewable and had to be remanded for further findings. ARB No. 12-0049, slip op. at 20-21. The Board in *Gupta* did not mention *Talukdar*.

[84] *See, e.g., Thompson v. Somervell Cnty.*, 431 F. App'x 338, 342 (5th Cir. 2011) (unpublished) (finding prior knowledge essential to causation element of prima facie case under *McDonnell Douglas*); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) (same); *Brooks v. Capistrano Unified School Dist.*, 1 F. Supp. 3d 1029, 1037-38 (C.D. Calif. 2014) (finding prior knowledge essential to causation element under motivating factor standard); *Leiva v. Union Pac. R. R. Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036, slip op. at 6 n.12 (ARB May 17, 2019) (finding prior knowledge essential to causation element under contributing factor standard).

[85] We summarily reject any claim regarding adverse conduct that occurred before Nieman first engaged in activity protected by the INA which, at the earliest, was on April 9, 2016, when Nieman emailed his concerns about H-1B violations to the EEOC. *See Chivers v. Wal-Mart Stores, Inc.*, 641 F.3d 927, 933 (8th Cir. 2011) (finding acts occurring before protected activity "cannot be causally related" to protected activity); *Moron-Barradas v. Dep't of Educ. of Com. of Puerto Rico*, 488 F.3d 472, 481 (1st Cir. 2007) ("It is impossible for the [defendant] to have retaliated against [the plaintiff] before she engaged in protected activity").

[86] Compl. Am. Br. at 4. Despite these references, it is not clear from Nieman's appellate briefs whether he challenges the ALJ's decision with respect to this pre-

suggest that SEG knew of his DOL complaints or that he had helped to prompt the Wage and Hour investigation when the alleged adverse pre-termination conduct occurred.

In stark contrast to Nieman's many references to his EEOC activity, Nieman never told SEG about his DOL complaints until after the pre-termination conduct had occurred.[87] There is also no evidence SEG learned of Nieman's protected activity from any other source, including the DOL. When Nieman filed his first DOL complaint in June 2016, he requested that DOL keep his identity confidential[88] and there is no evidence that DOL breached that confidentiality. Wage and Hour made no reference to Nieman in the letter notifying SEG of the investigation.[89] In fact, the letter made no indication the investigation was prompted by a complaint at all. Although, as Nieman points out and the ALJ acknowledged, the subsequent Wage and Hour determination letter made reference to a "complaint," it did not name Nieman or provide any information that could have implicated Nieman as the complainant.[90] The three key players in the conduct alleged by Nieman—Grimm, Jones, and Van Coevorden—also each denied knowing about his protected activity until sometime after Nieman revealed himself as a whistleblower in his June 26, 2017 emails to Brink.[91]

Nevertheless, Nieman asserts that SEG may have suspected he filed a complaint or helped prompt the Wage and Hour investigation. In support of this assertion, Nieman points to the fact that Wage and Hour conducted an "extensive" investigation and received many documents from SEG, and the fact that Grimm, as General Counsel, would have had insight into and participated in the investigation. Even accepting these facts as true, Nieman does not explain how SEG could have deduced or suspected that Nieman was the whistleblower behind the investigation based on these facts.

Although it is not clear, Nieman also appears to argue that the pattern of animosity he suffered after he filed the DOL complaint in 2016 serves as circumstantial evidence of SEG's knowledge of his conduct and intent to retaliate against him for it. Nieman offered no evidence that would link this adverse conduct to the Wage and Hour investigation or Nieman's DOL complaints. To the contrary,

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termination conduct. Out of an abundance of caution, and because it was analyzed by the ALJ in the D. & O., we will consider the conduct as part of Nieman's INA claim.

87 *See* Nieman Dep. at 96.

88 CDX 6.

89 CDX 3

90 CDX 4.

91 Exhibit A to Van Coevorden Decl.; Exhibit A to Grimm Decl.; Exhibit B to Jones Decl.

in his Opposition to SEG's Motion for Summary Decision, Nieman repeatedly argued this conduct was prompted by his EEOC activity, not his DOL complaints.[92] His internal complaint to SEG on June 9, 2017, his complaint to the DOL on June 24, 2017, and his statement to a Wage and Hour investigator on October 30, 2017, also show that he believed the prior adverse conduct was caused by his EEOC complaints, not his DOL complaints.[93] His attempt to connect the alleged pattern of animosity to his DOL complaints is based on speculation.

Nieman also points to an email sent by Grimm suggesting that Grimm had Nieman under "scrutiny" as of December 2016, six months after Nieman filed his first DOL complaint.[94] Nieman asked the ALJ, and now the Board, to accept this as direct evidence of knowledge and retaliatory motive.[95] But, the email does not state or give context to the reason for the "scrutiny," what type of "scrutiny" Nieman was under, or any other suggestion that the "scrutiny" related to the DOL complaint filed many months prior.[96] Moreover, Nieman argued below that the "scrutiny" was prompted by his EEOC activity, not his DOL complaint.[97] Again, Nieman merely

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92 Compl. Opp. at 5 ("Nieman suffered various bouts of objective retaliation . . .[that] was part of a coordinated effort by SEG executive officers Grimm and Jones that commenced in October 2015" when Nieman filed his first EEOC complaint), 6 ("Jones embarked on a crusade to improperly discredit or force Nieman to quit within days after the large layoff and demotion event that led to Nieman's good faith and reasonable EEOC/FCHR charge."), 8 ("Grimm and Jones conspire[ed] together and with others to try and falsely discredit Nieman for nearly two years" after he filed his EEOC complaint"), 22 (stating that after Nieman responded to SEG's EEOC position statement that "SEG was incensed at this action and recommended [sic] the pattern of retaliation against him almost immediately, particularly by way of Grimm"), 59 (referring to the "obvious retaliatory animus [Jones] developed as far back as October 2015" when Nieman filed his first EEOC complaint), 78 ("[T]he history shows that Grimm, incensed by Nieman's amended EEOC charge . . . concocted a scheme to try and discredit Nieman and/or to harass him into resigning, and then began looking for any possible cause to find fault with.").

93 CDX 25 (asking for an "assurance that I am not being treated adversely" because of his EEOC complaints); CSDX M (stating "the organization may be re-commencing their efforts to improperly force me out subsequent to an EEOC/FCHR charge"), V at 3 (stating Grimm's "behavior seemed increasingly hostile after the expiration of the right to sue letter from EEOC").

94 Complainant's Motion to Compel Exhibit E at WD/Nieman–0820.

95 Compl. Am. Br. at 28.

96 We note that Nieman does not appear to have requested to take any depositions, including a deposition of Grimm, which could have provided clarity to the context or meaning of the email.

97 Compl. Opp. at 78 (linking the "scrutiny" email to Nieman's response to SEG's EEOC position statement).

speculates that the email had something to do with his DOL complaint, despite the undisputed evidence that SEG did not know about the DOL complaint at the time.

To avoid summary decision, Nieman was required to set forth specific facts and evidence, not mere speculation or unsupported allegations, to demonstrate a genuine issue of fact for trial.[98] Neiman's speculative and unsupported arguments that SEG knew or suspected he had engaged in protected activity do not warrant reversal of the ALJ's entry of summary decision.

D. Termination

Although Nieman failed to produce any evidence suggesting that SEG knew about his first DOL complaint or his role in causing the Wage and Hour investigation when it engaged in any of the alleged pre-termination conduct, it is undisputed that Nieman identified himself as a whistleblower to SEG via emails on June 24, and 26, 2017. SEG terminated Neiman's employment shortly thereafter, on July 10, 2017. Ordinarily, this close temporal proximity may warrant a hearing on the issue of causation. However, we agree with the ALJ that the undisputed evidence shows that SEG had already contemplated terminating Nieman's employment on June 23, 2017, a day before it learned about his protected activity. Accordingly, his protected activity could not have caused the termination.

Although SEG did not officially terminate Nieman's employment until July 10, 2017, Grimm, Van Coevorden, and Jones all declared that they decided to terminate Nieman's employment on June 23, 2017, before learning about his protected activity.[99] Van Coevorden met with Nieman that day and decided he would be unable to accept the collaborative, flexible approach SEG wanted in its claims operations.[100] She shared her thoughts with Grimm, who concurred.[101] Jones independently determined on June 23, 2017, that Nieman's employment should be terminated after he discovered Nieman had sent emails to individuals outside of the company that Jones considered "completely wrong."[102] This all occurred the day before Nieman identified himself as a whistleblower to SEG's Chief Executive Officer. As stated by the ALJ, an employee cannot establish causation if the

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98 *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44 (2d Cir. 2015); *Kersten,* ARB No. 06-0111, slip op. at 6.

99 Van Coevorden Decl. at ¶4; Grimm Decl. at ¶5; Jones Decl. at ¶5.

100 Van Coevorden Decl. at ¶4.

101 Van Coevorden Decl. at ¶7; Grimm Decl. at ¶5.

102 Jones Decl. at ¶5.

employer merely proceeds along a course of action already contemplated before it learned of his protected activity.[103]

Nieman argues that he created a dispute of fact as to whether his protected activity could have caused his termination because he showed that SEG did not make a final decision to terminate his employment until after he identified himself as a whistleblower. It is true that Carney and Strachota did not agree to Grimm's, Jones', and Van Coevorden's recommendations until June 26, 2017.[104] It is also true that Grimm recommended on June 26 that a final decision be deferred until Brink completed her investigation into Nieman's allegations.[105] However, as Supreme Court and other federal precedent makes clear, the fact that an employer "contemplated" termination before learning of the employee's protected activity undercuts an argument about causation, even if the employer does not make a final decision until after learning of the employee's protected activity.[106]

Nieman also attempts to create a dispute of fact as to whether Grimm, Jones, and Van Coevorden actually contemplated the termination of his employment on June 23, 2017, as they each asserted in their declarations. Neiman asserts that there is no contemporaneous evidence that corroborates that they each decided to terminate Nieman's employment that day.[107] He also emphasizes that the three declarants did not aver that they had made their decisions on June 23, 2017, until it came time for SEG to move for summary decision.[108] General attacks on witness credibility like these do not create a triable issue of fact.[109] Nieman must present evidence to create a factual dispute; speculation does not suffice.

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103 *Clark Cnty. School Dist. v. Breeden*, 532 U.S. 268, 272 (2001); *Kuehu v. United Airlines*, ARB No. 2012-0074, ALJ No. 2010-CAA-00007, slip op. at 6-7 (ARB Feb. 10, 2014); *Cerny v. Triumph Aerostructures-Vought Aircraft Div.*, ARB No. 2019-0025, ALJ No. 2016-AIR-00003, slip op. at 9-10 (ARB Oct. 31, 2019).

104 Carney Decl. at ¶¶2-3; Strachota Decl. at ¶¶2-3.

105 Grimm Decl. at ¶8.

106 *Breeden*, 532 U.S. at 272; *Butterworth v. Laboratory Corp. of Am. Holdings*, 581 F. App'x 813, 816 (11th Cir. 2014) (unpublished); *Pearson v. Mass. Bay Transp. Auth.*, 723 F.3d 36, 38-39, 42 (1st Cir. 2013); *Bunn v. Perdue*, 1:17-cv-01064-LF-JFR, 2019 WL 2339995, at *2-3, 8 (D.N.M. June 3, 2019); *Ferree v. Rogers Grp., Inc.*, No. 5:12-CV-00166-TBR, 2014 WL 1092188, at *3-4 (W.D. Ky. Mar. 18, 2014).

107 Compl. Am. Br. at 20, 23.

108 *Id.* at 12.

109 *Howell v. Bluefield Reg'l Med. Ctr., Inc.*, 1:07-0112, 2008 WL 2543448, at *3 (S.D. W.Va. June 23, 2008) (finding that the absence of corroborating evidence as to when decision to terminate was first contemplated does not create jury question); *Worku v. Preflight Parking*, ARB No. 2007-0028, ALJ No. 2006-STA-00040, slip op. at 9 (ARB Apr. 22, 2008) ("The mere possibility that the fact finder might reject the moving party's

Moreover, although there is no written, contemporaneous memorialization of Van Coevorden's, Grimm's, and Jones' decisions to terminate Nieman's employment on June 23, 2017, the declarants' averments are supported by other evidence in the record. In his June 24, 2017 DOL complaint, Nieman stated that his June 23 meeting with Van Coevorden led him to believe that "the organization may be re-commencing their efforts to improperly force me out . . . ."[110] Similarly, Nieman told a Wage and Hour investigator that his takeaway from his meeting with Van Coevorden was that she "was attempting to set up a wrongful termination."[111] Thus, Van Coevorden's statement that she made her decision on June 23 is consistent with Nieman's own perception of his meeting with her. Evidence also shows that Jones was in fact notified of Nieman's emails to individuals outside of the company on June 23, which he declared prompted his decision to recommend SEG terminate Nieman's employment.[112]

Nieman also contends that the reasons SEG proffered for his termination have shifted over time and are demonstrably false.[113] He argues this creates a triable issue as to the legitimacy of the termination of his employment and precludes the entry of summary decision. As the ALJ stated in response to Nieman's Motion for Reconsideration, although the reasons for Nieman's termination may be in dispute, that dispute is not material to the outcome of the case.[114] As the ALJ stated, an employee can be terminated for good reason, bad reason, or no reason at all, just not an illegal reason.[115] Because there is no evidence that SEG was aware of Nieman's protected activity when it contemplated terminating his employment, the dispute over the justifications SEG gave for the termination are irrelevant to the outcome of the case.

E. Post-Termination Conduct

In its Motion for Summary Decision, SEG focused on the conduct and events leading up to the termination of Nieman's employment. Although SEG did not move

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evidence on credibility grounds is not enough to forestall summary judgment for the moving party.").

110 CSDX M.

111 CSDX V at 4.

112 CDX 28; Jones Decl. at ¶5.

113 Similarly, Nieman argues that the declarations, particularly the declaration provided by Grimm, include "verifiable falsehoods" and "perjury" regarding their proffered explanations for his termination. Compl. Am. Br. at 12.

114 September 28, 2018 Order Denying Reconsideration at 2.

115 *Id.* (citing *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018)).

for summary decision with respect to the events occurring after SEG terminated Nieman's employment, Nieman discussed the issue extensively in his Opposition brief.[116] The ALJ determined Nieman failed to present evidence creating a genuine factual dispute regarding the post-termination conduct and dismissed the claim. Nieman argues briefly that this was reversible error. We disagree.

An ALJ may grant summary decision for a non-movant, or grant a motion for summary decision on grounds not raised by a movant, as long as he provides notice and an opportunity to respond.[117] Although the ALJ did not expressly provide notice that he was considering granting summary decision on the issue of post-termination conduct, Nieman himself put the issue before the ALJ in his Opposition. Nieman also had the opportunity to be heard. His argument to the ALJ on the issue was extensive—his factual recitation and arguments concerning the post-termination conduct covered nearly thirteen pages of his Opposition brief. Nieman does not argue that there were any facts, evidence, or arguments that he was not able to present to the ALJ in his Opposition. Under these circumstances, and without any evidence of unfair prejudice, we conclude that the ALJ's consideration of the post-termination conduct in the D. & O. was not in error.[118]

We also agree with the ALJ that Nieman failed to raise a dispute of fact as to his post-termination retaliation claims. With respect to the first two alleged forms of post-termination retaliation—the alleged frivolous lawsuit and the alleged improper proposal for settlement—the ALJ concluded that Nieman had failed to provide any evidence to suggest that his protected activity caused SEG's alleged adverse conduct.[119] On appeal, Nieman failed to present any argument as to causation. Instead, he focused entirely on the general proposition that post-termination conduct of the type alleged here may be actionable in an INA claim and should be considered under the "continuing violation" doctrine.[120] Because Nieman failed to present any argument as to why the ALJ erred by concluding that Nieman had not presented any evidence of causation, we affirm the ALJ.

With respect to the final alleged form of post-termination retaliation—SEG's alleged efforts to cause his subsequent employment to be quickly terminated—the ALJ stated that Nieman had failed to present any evidence that such conduct had

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116 Compl. Opp. at 32-38, 99-105.

117 29 C.F.R. § 18.72(f).

118 *See Delphi Auto Sys., LLC v. United Plastics, Inc.*, 418 F. App'x 374, 380-83 (6th Cir. 2011) (unpublished).

119 D. & O. at 13.

120 Complainant's Second Petition for Review (Compl. Second PR) at 36-39; Compl. Am. Br. at 29-30.

actually occurred.[121] Nieman confirmed as much in his Opposition to SEG's Motion for Summary Decision below, in which he alleged this aspect of his claim was "as of yet unproven."[122] Nieman has not presented any evidence to suggest that SEG had a role in his termination. Because his claim is based on mere speculation, and in light of his admission below that his claim was "unproven," we affirm the ALJ.

F. Discovery Dispute

Nieman also argues that the ALJ's entry of summary decision was premature in light of SEG's alleged failure to properly participate in discovery. Before the ALJ entered summary decision, Nieman issued a number of discovery requests—twenty five interrogatories, not including subparts, twenty-two requests for production, and 191 requests for admission. SEG responded with numerous objections, but answered many of the requests and produced more than 1,100 documents. Nieman argued in his Motion to Compel and in his Opposition to SEG's Motion for Summary Decision that SEG's objections were meritless and that SEG's answers were incomplete and unresponsive. The ALJ found that Nieman had failed to present evidence that SEG had not reasonably participated in discovery.[123] As set forth above, the ALJ also considered Nieman's discovery arguments in response to his Motion for Reconsideration. The ALJ reviewed the discovery that he considered relevant to the issue of SEG's knowledge of Nieman's protected activity. The ALJ found that SEG provided adequate responses or that Nieman's requests were speculative.[124]

ALJs have wide discretion to set or limit the scope of discovery and will be reversed only when such evidentiary and discovery rulings are arbitrary or an abuse of discretion.[125] To establish an abuse of that discretion, Nieman must, at a minimum, show how further discovery could have permitted him to rebut SEG's Motion for Summary Decision.[126] Nieman must offer more than mere speculation as to what facts might be uncovered by additional discovery.[127] He must "state with

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121 D. & O. at 13.

122 Compl. Opp. at 103.

123 D. & O. at 10.

124 September 8, 2018 Order Denying Reconsideration at 2-6.

125 *McNiece v. Dominion Nuclear Conn., Inc.*, ARB No. 2015-0083, ALJ No. 2015-ERA-00005, slip op. at 6 (ARB Nov. 30, 2016).

126 *See id.; Saporito v. Central Locating Servs., LTD*, ARB No. 2005-0004, ALJ No. 2001-CAA-00013, slip op. at 10 (ARB Feb. 28, 2006).

127 *See Bucalo v. United Parcel Serv., Inc.*, ARB No. 2010-0107, ALJ Nos. 2008-SOX-00053, 2008-STA-00059, slip op. at 4 (ARB Mar. 21, 2012).

some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment."[128]

Nieman argues he was denied discovery on a number of subjects,[129] several of which are irrelevant to the causation issue upon which the ALJ granted summary decision. For example, in his appellate briefs Nieman faults SEG for failing to produce documents and information related to other employees' claims of misconduct, discrimination or retaliation, Grimm's disciplinary record, comparator data, the nature of SEG's E-3 or H-1B visa hiring practices, and documents and communications related to the EEOC's investigation of Nieman's complaint. Nieman has not explained how any of this information could have helped him rebut SEG's arguments on the narrow issue of causation.

Nieman also argues that he was denied documents related to SEG's interactions with the DOL during the Wage and Hour investigation.[130] Other than a general argument that SEG failed to produce documents on this issue, Neiman has not explained specifically how the requested information or documents would have led to evidence that would have raised a material fact question regarding the causation element of his retaliation claims. Nieman has not articulated what documents he expected would have been exchanged in that investigation, aside from the investigation and determination letters which were produced, that could have led SEG to suspect Nieman was involved in the investigation. Nieman is merely speculating that any of the documents would have implicated him in the investigation, particularly because he expressly asked DOL to keep his identity confidential.

Nieman also argues SEG failed to produce "the majority of communications" related to SEG's investigation of Nieman and the termination of his employment.[131] Despite offering objections to Nieman's discovery requests on this subject, SEG repeatedly stated that it would produce all documents relevant to Nieman's termination from employment.[132] Nieman has not shown that there was anything else for SEG to produce other than what was included in the 1,100 pages it produced to Nieman. Furthermore, other than the general argument that SEG failed to produce all of the documents it had on this subject, Nieman has not

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[128] *See id.* (quoting *Moore v. U.S. Dep't of Energy*, ARB No. 1999-0047, ALJ No. 1998-CAA-00016, slip op. at 4 (ARB June 25, 2001)).

[129] On appeal, Nieman failed to cite to specific discovery requests or responses in support of his arguments about discovery.

[130] Compl. Am. Br. at 20, 26.

[131] Compl. Second PR at 34.

[132] Respondent's Responses to Request for Production of Documents Nos. 3, 9, 12, attached to Complainant's Motion to Compel.

explained why any other documents concerning the termination of his employment or the reasons therefore could have helped him rebut the conclusion that his termination was contemplated before SEG became aware of his DOL complaints.

Finally, Nieman argues that he was "precluded from conducting reasonable discovery and/or examination of Respondent and its managers, officers, and/or records" regarding the alleged post-termination conduct.[133] However, once again on appeal Nieman failed to elaborate on his argument, explain to any meaningful degree what facts might be uncovered by additional discovery, precisely state the materials he hoped to obtain with further discovery, or articulate exactly how he expected those materials would help him in opposing summary decision. Absent any elaboration, we find that Nieman's argument is speculative and does not warrant reversing the ALJ's grant of summary decision.

Accordingly, we hold that the ALJ did not abuse his discretion by rejecting Nieman's discovery arguments and denying the Motion to Compel as moot when he entered summary decision.[134]

CONCLUSION

For the foregoing reasons, we find that the ALJ properly entered summary decision for SEG, properly denied Nieman's Motion for Reconsideration, and properly denied and/or deemed as moot all pending motions, including Nieman's Motion to Compel. Accordingly, we **AFFIRM** the ALJ's decision and the complaint is hereby **DENIED**.

SO ORDERED.

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[133] Compl. Second PR at 39.

[134] Nieman made many assertions and arguments regarding the merits of his claims and the alleged errors committed by the ALJ in his Opposition below and in his appellate briefs. We reject any of Nieman's arguments not specifically addressed herein.