UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEMARCO TAFT, Plaintiff,	
-v-	No. 1:19-cv-35
PARAMOUNT COFFEE COMPANY, Defendant.	Honorable Paul L. Maloney

OPINION AND ORDER DENYING MOTION TO DISMISS AND GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff DeMarco Taft worked for Defendant Paramount Coffee Company. Taft alleges he was terminated in retaliation for refusing to work in unsanitary conditions, objecting to using expired products, and declining to falsify accountability records.[1] Taft asserts that his claim arises under the Food Safety Modernization Act. Paramount Coffee contends Taft was fired for violations of its workplace violence policy. Paramount Coffee filed a motion to dismiss (ECF No. 24) and a motion for summary judgment (ECF No. 37). The Court will deny the motion to dismiss and will grant the motion for summary judgment.

I.

For its motion to dismiss, Paramount Coffee argues both a lack of jurisdiction and a failure to state a claim.

[1]Taft proceeds without the benefit of counsel. This Court must liberally construe the pleadings and other filings of pro se parties. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999); *see Owens v. Keeling*, 461 F.3d 763, 776 (6th Cir. 2006).

A. Jurisdiction

Paramount Coffee relies on Rule 12(b)(1) for its challenge to this Court's subject-matter jurisdiction. When challenged by a motion filed under Rule 12(b)(1), the plaintiff bears the burden of establishing subject-matter jurisdiction. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 776 (6th Cir. 2010) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). A motion to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction may take the form of a facial challenge, which tests the sufficiency of the pleading, or a factual challenge, which contests the factual predicate for jurisdiction. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (quoting *Mortensen v. First Fed. Savings and Loan Ass'n*, 549 F.2d 884, 890-91 (3d Cir. 1977)); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In a facial attack, the court accepts as true all the allegations in the complaint, similar to the standard for a Rule 12(b)(6) motion. *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325. In a factual attack, the allegations in the complaint are not afforded a presumption of truthfulness and the district court weighs competing evidence to determine whether subject-matter jurisdiction exists. *Id.*

Paramount Coffee argues Taft did not timely file his complaint with the district court. Because Paramount Coffee attaches a number of exhibits to its motion and relies on those exhibits, the Court treats the motion as a factual attack.

Taft filed a complaint with the Department of Labor on September 27, 2017. The Secretary issued findings on October 5, 2018. In the letter, Taft was informed that the

Department could not corroborate Taft's allegations that his termination was retaliatory. (ECF No. 24-8 PageID.155-56.) Taft was told he could file an appeal with the Chief Administrative Law Judge "within 30 days of receipt of these findings." (*Id.* PageID.156.) The letter provided a mailing address for the Chief Judge (no name, just a title) and did not provide an email address.

Taft did not receive the Secretary's findings on October 5. The Secretary's findings must be sent to all parties by certified mail, with return receipt requested. 29 C.F.R. § 1987.105(b). Paramount Coffee has included in its submissions to this Court an email from an investigator with the Department of Labor who explained what happened to the letter sent to Taft. (ECF No. 9-1 PageID.36.) The findings were sent by certified mail using the United States Postal Service. A notice of the mailing was left at Taft's residence on October 9. Taft did not pick up the mail until October 22. Taft emailed his objections to the Department of Labor on November 8, 2018. (ECF No. 1-2 PageID.12-16.) Taft then forwarded his objections to others, including to Paramount Coffee, on November 9. (*Id.* PageID.12.)

On January 7, 2018, Paramount Coffee filed a motion to dismiss with the Department of Labor. The same day, an Administrative Law Judge (ALJ) issued a notice that the case had been assigned to him. (ECF No. 1-2 PageID.8.)

Taft filed the complaint to initiate this lawsuit on January 27, 2019. On February 5, 2019, the AJL dismissed the proceeding. (ECF No. 13-1 PageID.53-54.) The ALJ explained that because no final decision had issued within 210 days after Taft filed his complaint with the Department of Labor, Taft was able to file a complaint in federal court.

This Court has jurisdiction over Taft's lawsuit. The relevant statute and regulations identify two time periods for initiating an action in federal court after filing a complaint with the Department of Labor. First, the complainant may initiate judicial action if the Secretary of Labor has not rendered a final decision within 210 days after the filing of the complaint. 21 U.S.C. § 399d(4)(A); 29 C.F.R. § 1987.114(a)(2). Second, the complainant may initiate judicial action within 90 days after receiving a written determination by the Secretary, provided the Secretary has not rendered a final decision. 21 U.S.C. § 399d(4)(a); 29 C.F.R. § 1987.144(a)(1) (referring to the "written determination under § 1987.105(a)"). The 90-day provision does not contain any language suggesting that when the 90-day window closes, the more-than-210-day provision also closes.

This Court can review Taft's complaint under the 210-day provision. Taft filed his complaint with the Department of Labor on September 27, 2017. More than 210 days had passed when Taft initiated this federal action on January 27, 2019.

The Secretary had not rendered any final decision before Taft initiated this action. The statute and regulations provide a mechanism for the findings, the Secretary's written determination, to become a final order. Here, the Secretary issued a written determination on October 5, 2018. *See* 29 C.F.R. § 1987.105(2). Taft then had 30 days from the day he received the written determination to file objections.[2] 29 C.F.R § 1987.105(c); 29 C.F.R. §

[2] Paramount Coffee insists the relevant date for the start of the 30-day window to file objections is October 5, the date on the letter. Both § 1987.105(c) and § 1987.106(a), and the letter itself, state that the 30-day window begins when the letter is received, not when the written determination is sent to the complainant.

1987.106(a). If he did not timely file any objections, the written determination would become a final decision that would not be subject to judicial review. 29 C.F.R. § 1987.106(b).

The record establishes that the written determination issued by the Secretary on October 5 did not become a final order because Taft timely filed objections. The earliest Taft would have received the written determination was October 9, 2018, when the United States Postal Service attempted service of the certified mail and left a notice at the mailing address. (ECF No. 9-1 PageID.36.) Taft did not actually obtain the certified mail containing the written determination until October 22. The Court need not decide whether the notice on October 9 or actual receipt on October 22 is the critical date because the record establishes that Taft emailed his objections on November 8, 2018, 30 days after October 9. (ECF No. 1-2 PageID.12.) The date of the email constitutes the date that the objections were filed. 29 C.F.R. § 1987.106(a).

The regulation specifies how a party must file objections and permits objections to be filed electronically. The regulation provides that "[a]ny party who desires review, . . . , must file any objection . . . within 30 days of receipt of the findings and preliminary order pursuant to § 1987.105." 29 C.F.R. § 1987.106(a). The regulation then specifies that "[t]he date of the postmark, . . . , or electronic communication transmittal is considered the date of filing; . . . ." *Id.* "Objections must be filed with the Chief Administrative law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor." *Id.* Taft emailed his objections to three different email addresses with the

Department of Labor. (PageID.12.) Paramount Coffee has not alleged or established that the office of the Chief Administrative Law Judge has its own email account. The Department of Labor and the ALJ both treated Taft's November 8 email as a timely objection. (ECF No. 9-1 PageID.26; ECF No. 13-1 PageID.53.) The ALJ also stated that no final decision had been rendered by the by the Secretary. (ECF No. 13-1 PageID.54.)

Taft's failure to mail copies of his objections to Paramount Coffee at the same time he electronically filed his objection does not make the written determination a final decision. In addition to filing the objection, the regulation requires the claimant to mail copies of his objection to other parties. The Court finds significant that the regulation imposes two different obligations on a party who desires review: "must file" and "must be mailed." The written determination becomes a final decision only "[i]f no timely objection is filed[.]" 29 C.F.R. § 1987.106(b). While there may be some consequence for the failure to mail copies of the objections to the listed individuals, the language of the regulation does not suggest that failure to mail copies of an objection forecloses any possibility of review. The failure to mail copies implicates Paramount Coffee's notice of the objections. Absent clear evidence that Congress intended a procedural requirement to "cabin a court's power," courts should not treat the procedural requirement as a requirement for subject-matter jurisdiction.[3] *United States v. Kwai Fun Wong*, 575 U.S. 402, 409-10 (2015); *but see K.C. Knoke v. Ferraro Foods of North Carolina LLC*, 2018-FDA-00001 (U.S. Dep't of Labor Mar. 1, 2018) (finding that

[3] The Seventh Circuit recently considered the 14-day deadline for filing an appeal of an ALJ's decision under 29 C.F.R. § 1987.110(a) and concluded that the deadline is not jurisdictional and is subject to equitable tolling. *Madison v. United States Department of Labor*, 924 F.3d 941, 946 (7th Cir. 2019).

the respondent's failure to send copies of his objection in the mail to his employer deprived the ALJ of jurisdiction to review the Secretary's findings).

B. Failure to State a Claim

Paramount Coffee relies on Rule 12(b)(6) for its argument that Taft's complaint fails to state a claim upon which relief may be granted. To survive a motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "The complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (citation omitted). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,* 648 F.3d at 369.

Taft filed his complaint using an approved form for civil complaints brought by pro se parties. He states that his claim arises under 12 U.S.C 339d, the Food Safety Modernization Act (FSMA). (ECF No. 1 Compl. PageID.3.) He succinctly outlines the basis for his claim.

> Plaintiff was wrongfully discharged in Retaliation for good faith refusal to perform unsanitary work without required swabs, and for objecting to recirculating expired product and falsifying batch accountability records.

(*Id.* PageID.4.) Those allegations, if true, appear to state a plausible claim. Under the FSMA, employers engaged in the manufacture, processing, and distribution of food may not discharge an employee for objecting to or refusing to participate in a task that the employee reasonably believes to be a violation of any provision of the statute or relevant regulation. 21 U.S.C. § 399d(a)(4). Taking the facts alleged in the complaint as true, Taft engaged in protected activity; he refused to perform a task he reasonably believed violated the law. He suffered an adverse employment action when he was fired. He alleges a connection between the two.

The documents attached to the complaint do not undermine Taft's *prima facie* case. Taft attached the Secretary's written determination that he did not have a claim for retaliation and also attached his objection. The Secretary's findings were that Taft was terminated for a different reason. Taft addressed that conclusion in his objections. The Court must accept Taft's well pled factual allegations as true. Paramount Coffee may ultimately prove that Taft was fired for some other reason. That other reason is not contained in Taft's allegations. The Court will not consider the affidavits attached to Paramount Coffee's Rule 12 motion. *See* Fed. R. Civ. P. 12(d).

II.

Paramount Coffee requests summary judgment under Rule 56. Unlike a motion under Rule 12, where the Court considers only the allegations made by the plaintiff, a court considers the evidence submitted by both parties when resolving a motion brought under Rule 56.

A.

The legal standards for evaluating a motion for summary judgment are well established. A trial court should grant a motion for summary judgment only in the absence of a genuine dispute of any material fact and when the moving party establishes it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the burden of showing that no genuine issues of material fact exist. *Celotex Crop. v. Catrett*, 477 U.S. 317, 324 (1986). To meet this burden, the moving party must identify those portions of the pleadings, depositions, answers to interrogatories, admissions, any affidavits, and other evidence in the record, which demonstrate the lack of genuine issue of material fact. Fed. R. Civ. P. 56(c)(1); *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 627-28 (6th Cir. 2018). The moving party may also meet its burden by showing the absence of evidence to support an essential element of the nonmoving party's claim. *Holis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 (6th Cir. 2014).

When faced with a motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Pittman*, 901 F.3d at 628 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Like the party that filed the motion for summary judgment, the non-moving party opposing the motion must support the facts on which it relies with evidence. Fed. R. Civ. P. 56(c)(1). The court must view the facts and draw all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018) (citing *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In resolving a motion for summary judgment, the court does not weigh the evidence and determine the

truth of the matter; the court determines only if there exists a genuine issue for trial. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson*, 477 U.S. at 249). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

B.

No discovery has been ordered in this lawsuit. In lieu of an answer, Paramount Coffee filed its motion to dismiss. While that motion was pending, Paramount Coffee filed its motion for summary judgment. Under Rule 56(d), a nonmoving party may oppose a motion for summary judgment by establishing, through an affidavit, that he or she cannot present material facts necessary to justify opposition to the motion. Taft did not raise a lack of evidence as part of his response to the motion. However, since Paramount Coffee filed its reply, Taft has filed two Rule 56(d) affidavits. (ECF Nos. 49 and 53.)

The Court has reviewed the affidavits and concludes that they do not establish a basis for deferring or denying the motion for summary judgment. Through the affidavit, the nonmoving party must show the "need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (citation omitted). Generally, Taft fails to identify what material facts he hopes to uncover. Some of the concerns identified in the affidavit are not material facts that would made a difference to the outcome of the motion for summary judgment. For example, Paramount Coffee relies on affidavits from several individuals and Taft contends those individuals are no longer employees. (ECF No. 53.) The current

employment status of those individuals is not a material fact. Other concerns Taft raises in his affidavits are addressed below.

C.

To prove a retaliation claim under the FSMA, a plaintiff must show (1) he or she participated in a protected activity under the FSMA which was known by the defendant, (2) he or she suffered an adverse employment action that would dissuade a reasonable employee from exercising his or her rights under the FSMA, and (3) a causal connection between the protected activity and the adverse action. *Chase v. Brothers Int'l Food Corp.*, 3 F. Supp. 3d 49, 53-54 (W.D.N.Y. 2014) (relying on the elements for a retaliation claim arising under other employment statutes). The statute requires the plaintiff to prove only that his or her protected activity action was "a contributing factor" to the adverse employment action. 21 U.S.C. § 399d(2)(C)(iii). And, the statute sets forth an affirmative defense. If the employer can show by clear and convincing evidence that it would have taken the same adverse action in the absence of the plaintiff's protected activity, then no relief should be ordered. *Id.* § 399d(2)(C)(iv).

Paramount Coffee has provided the Court with signed affidavits and other documents. The Court has considered Taft's affidavits both as Rule 56(d) affidavits and as evidence to oppose the motion for summary judgment.

First, Paramount Coffee has put forth evidence showing that Taft was not engaged in a protected activity. Paramount Coffee submitted three affidavits: Wes Baker, the plant manager (ECF No. 37-2 Baker Aff. PageID.251-52), Tika Robinson, the quality control employee (ECF No. 37-3 Robinson Aff. PageID.254-55), and Jovan Wilder, the shift

supervisor (ECF No. 37-4 Wilder Aff. PageID.258.) Baker, Robinson, and Wilder all state that Taft never reported any concerns with or violations of federal food safety regulations. (Baker Aff. ¶ 7 PageID.251; Robinson Aff. ¶ 5 PageID.254; Wilder Aff. ¶ 3 PageID.258.)

Paramount Coffee's evidence establishes that Taft's allegedly protected activity does not concern federal food safety violations. According to the affidavits, Taft's allegations concern a voluntary program not mandated by federal law. Baker states that Paramount Coffee obtained a Safe Quality Food (SQF) certification, which requires daily logs by machine operators, and cleaning and swabbing of the machines. (Baker Aff. ¶ 8 PageID.251-52.) Robinson and Wilder state that Taft would not cooperate with them to do random swabbing and would not complete or turn in the cleaning logs on a timely basis. (Robinson Aff. ¶ 2 PageID.254 and ¶ 6 PageID.256; Wilder Aff. ¶ 4 PageID.258.) In his response, Taft appears to admit that the SQF program is voluntary. (ECF No. 42 Pl. Resp. PageID.354.) Paramount Coffee has also submitted an affidavit from Christina Byers, the SQF practitioner for Paramount Coffee. (ECF No. 37-6 Byers Aff. PageID.266-67.) Myer states that, as part of SQF training, Taft was encouraged and instructed on how to report food safety and food quality concerns in his maintenance logs. (*Id.* ¶ 6 PageID.266.) Byers contends Taft attended these training sessions and that his logs do not contain any food safety or food quality concerns or allegations. (*Id.*; ECF No. 37-11 Training Presentation and Sign-In Sheet PageID.329-34; ECF No. 37-12 Corrective Action Log PageID.336-39.)

Taft's response contains at least two arguments which could be construed as referring to evidence to show that he engaged in protected conduct. Taft claims he raised concerns about possible violations of federal food safety laws and regulations (*e.g.*, considering coffee

as non-perishable after it is mixed with perishable flavorings) with multiple people on April 3 and April 4. Taft also discusses proceedings before Michigan's unemployment agency. Taft contends he prevailed in that forum.[4] Taft, however, presents no evidence to support these arguments.[5]

Assuming, for the sake of argument only, that this Court could find a genuine issue of material fact concerning all three elements of a retaliation claim, Paramount Coffee has submitted sufficient evidence to show that it would have terminated Taft even if he had not engage in protected activity.

Paramount Coffee submitted evidence supporting its decision to terminate Taft for a violation of its workplace violence policy. Paramount Coffee's Employee Handbook contains a workplace violence policy, which states that employees who violate the policy may be terminated. (ECF No. 37-5 PageID.262-63.) In July 2016, Taft acknowledged receipt of the Handbook. (*Id.* PageID.261.) On April 3, 2017, Robinson complained to Baker about an incident with Taft involving verbal abuse and threats, including a threat to kill her. (Robinson Aff. ¶¶ 2 and 3 PageID.254; Baker Aff. ¶ 2 PageID.251.) Wilder witnessed Taft's threats to Robinson. (Wilder Aff. ¶ 2 PageID.258.) On April 5, Dale Baller, the assistant plant manager, and Baker discussed Robinson's allegations with Taft and provided Taft and

[4] Taft presents no evidence concerning the issues or outcome in the unemployment hearing. Taft would have been involved in that hearing. Taft has not identified any reason he needs discovery to find evidence concerning the unemployment proceeding.

[5] In one of his affidavits, Taft contends he refused to cooperate with the random SQF requirements on several occasions and also presented complaints and concerns. (ECF No. 49 ¶ 2a PageID.416-17.) At best, these allegations might show Taft had a reasonable basis for believing that he was raising concerns about violations of federal law, even if SQF requirements were not violations of federal law. Paramount Coffee rebuts Taft's allegations by demonstrating that Taft was trained to file complaints through logs and that his logs did not contain any such complaints or concerns.

opportunity to respond. (Baker Aff. ¶ 5 PageID.251.) Having found Robinson's allegations credible and corroborated by Wilder, Baker offered Taft a second chance if Taft would again acknowledge the workplace violence policy and agree to cease any threatening communication towards his co-workers. (*Id.*) Taft refused. (*Id.*) Taft was terminated because of the incident with Robinson and because Taft refused to accept the conditions of the second chance. (*Id.* ¶ 6 PageID.251.) Baker avers that the disciplinary meeting, and the choice presented to Taft, would have occurred even if Taft had reported food safety violations. (*Id.* ¶ 10 PageID.252.)

Taft disputes various statements in the affidavits. He denies that Paramount Coffee conducted an investigation of the incident. Taft admits that he, Baller and Baker had a meeting and generally confirms Baker's statements about the meeting. He does offer other facts about what occurred in the meeting. But, again, Taft presents no evidence to support his arguments. He has not provided any affidavit or other documents. The arguments contained within his brief are not evidence.

In one of his affidavits, Taft contends that, following the meeting with Baker and Baller, Baller stated that Robinson did not say Taft threatened to kill her. (ECF No. 49 ¶¶ 1b and 4 PageID.417.) Paramount Coffee submitted an affidavit from Baller, and Baller does not address whether he made any such statement to Taft. (ECF No. 44-2 Baller Aff. PageID.378.) Assuming Taft's allegation is true, it does not alter the outcome. Robinson reported verbal abuse and physical threats, which were confirmed by Wilder. Taft does not deny that he had a disagreement with Robinson and that the disagreement included verbal abuse and physical threats. And, Paramount Coffee has established that it would have

terminated Taft anyway because he refused to accept the conditions of the second chance he was offered.

III.

Defendant Paramount Coffee is entitled to dismissal of this lawsuit. The Court concludes that it has jurisdiction over Taft's complaint. Because no final decision occurred in the action before the Department of Labor, and because more than 210 days passed since Taft filed his complaint with the Department of Labor, Taft was able to initiate the lawsuit here in federal court. And, the complaint succinctly alleges sufficient facts to state a plausible retaliation claim. Paramount Coffee, however, has submitted evidence establishing that Taft was not engaged in protected conduct and that Taft would have been terminated even if he had been engaged in protected conduct. Taft did not submit any evidence which would create a genuine issue of material fact. The Court must, therefore, grant Defendant's motion for summary judgment.

ORDER

For the reasons provided in the accompanying Opinion, Defendant Paramount Coffee's motion to dismiss (ECF No. 24) is **DENIED** and its motion for summary judgment (ECF No. 37) is **GRANTED.** Taft's retaliation claim brought under the Food Safety Modernization Act is **DISMISSED.**

Because Plaintiff Taft has been granted *in forma pauperis* status, the Court has reviewed the record for the purpose of determining whether the find that an appeal would be taken in good faith. *See Neitze v. Williams*, 490 U.S .319, 327-30 (1989). The Court notes that Taft did not submit any evidence to oppose the motion for summary judgment. With that in mind, the Court concludes any appeal would be frivolous and would not be taken in good faith.

IT IS SO ORDERED.

Date: January 29, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge