NOT RECOMMENDED FOR PUBLICATION

No. 20-4075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT COLE, Petitioner, v. U.S. DEPARTMENT OF LABOR, Administrative Review Board, Respondent.	)	ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD

O R D E R

Before: SUTTON, Chief Judge; SILER and ROGERS, Circuit Judges.

Scott Cole, proceeding through counsel, petitions for review of a United States Department of Labor Administrative Review Board (ARB) order affirming an administrative law judge's (ALJ) order granting summary decision in favor of Norfolk Southern Railway Corporation and denying his complaint. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2016, Cole was employed as a conductor for Norfolk Southern and was also the local chairman of his union, the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART). Norfolk Southern terminated Cole's employment following a December 2016 investigation. Cole disputed his discharge, claiming that it was retaliatory because he reported railroad safety concerns.

Following his discharge, Cole filed a complaint with the Department of Labor Occupational Safety and Health Administration (OSHA), alleging that his employment was terminated in retaliation for activity protected by the Federal Railroad Safety Act (FRSA), 49

U.S.C. § 20109. Cole alleged that, in July 2016, he was informed that Norfolk Southern had contracted with Detroit Edison (DTE) to deliver coal from Toledo, Ohio, to Detroit, Michigan, and that, at the direction of DTE, Norfolk Southern would use railroad crews based out of Toledo to perform the work. According to Cole, he immediately expressed his safety concerns that Toledo-based crews were unfamiliar with, and unqualified to work in, the Detroit area. When Cole continued to express his safety concerns, Norfolk Southern Superintendent Mike Grace advised Cole that DTE required Norfolk Southern to use Toledo-based crews.

On December 19, 2016, Cole called DTE and asked a DTE representative, Brian Corbett, whether DTE made the decision to use Toledo-based crews for its contract with Norfolk Southern. DTE avoided the issue and referred Cole to Norfolk Southern. Two days later, Cole was charged with "conduct unbecoming an employee and detrimental to the interests of Norfolk Southern" based on the phone call. Following an investigation hearing at which Cole, Grace, and others provided statements, Norfolk Southern terminated Cole's employment for the charged conduct.

Cole claimed that his phone call to DTE was protected activity because, during the call, he "inquire[d] into the potential rule or regulation violation" related to the unsafe "use of unqualified crews without territorial knowledge" and reasonably believed in good faith that "DTE had the authority to prevent and correct the violation." Cole's safety concerns stemming from the use of Toledo-based crews in the Detroit area derived from Norfolk Southern operating rules and from federal regulations that require railroad employees to "have adequate territorial knowledge" and be qualified in the territory where they work. *See* 49 C.F.R. §§ 242.301, 242.119.

OSHA dismissed Cole's complaint, finding that the termination of his employment did not violate the FRSA. Cole objected to OSHA's findings and requested a hearing before an ALJ. An ALJ granted summary decision to Norfolk Southern and denied Cole's FRSA complaint, concluding that Cole's phone call to DTE was not protected activity. Cole petitioned for review with the ARB, which affirmed the ALJ's order.

Cole filed a timely petition for review of the ARB's order. He argues that the ARB erroneously affirmed the ALJ's summary decision despite genuine issues of material fact as to whether his employment was terminated based on protected activity.

The ARB concedes in its brief that we are to review de novo the agency grant of summary decision, by analogy to district court summary judgment, citing *Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491-92 (6th Cir. 2005), and we proceed to do so. However, the agency organic act in this case incorporates the scope of review provisions of the federal Administrative Procedure Act, *See* 49 U.S.C. § 20109(d)(4); 49 U.S.C. § 42121(b)(4)(A). This would mean that *factual* determinations are subject to the deferential arbitrary-and-capricious standard, or at most to the comparably deferential substantial-evidence standard. See 5 U.S.C. § 706. Where an agency is permitted to determine some dispositive facts without a hearing, such factual determinations are not necessarily subject to de novo review merely because the agency's decision can be analogized to a district court summary judgment.

To be sure, we review de novo pure questions of law in such circumstances, such as the common law definition of employee at issue in *Demski*. But where the agency's dispensing of a hearing is based on the compelling nature of the paper record regarding certain facts, and determining such facts without a hearing is not forbidden by the statute or regulations, the statute appears to require that we review such factfinding under a deferential arbitrary-and-capricious standard, or the similarly deferential substantial-evidence standard. Our reasoning below applying de novo review, however, *a fortiori* supports the denial of the petition for review under a more deferential scope of review.

The FRSA prohibits a railroad from, among other adverse employment actions, discharging an employee for engaging in protected activity. *See* 49 U.S.C. § 20109(a). Relevant here, an employee engages in protected activity if he provides information that he "reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security" to a "person who has the authority to investigate, discover, or terminate the misconduct." 49 U.S.C. § 20109(a)(1)(C). To establish a retaliation claim under the FRSA, "an employee must show that (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action." *Consol. Rail Corp. v. Dep't of Labor*, 567 F. App'x 334, 337 (6th Cir. 2014).

The record supports the ARB's conclusion that Cole did not offer sufficient evidence that any protected activity contributed to his termination. Following Cole's December 19 phone call to Corbett, Corbett memorialized the substance of their conversation in an email to Grace. According to Corbett, Cole called DTE to ask it to respond to claims that it was requiring Norfolk Southern to move Michigan jobs to Ohio for its coal contract with Norfolk Southern; Corbett declined to comment and referred Cole to Norfolk Southern. Corbett's email did not indicate that Cole expressed any safety concerns during the call. Grace's statement at the December 28 investigation hearing was consistent with Corbett's email. Grace described a conversation with Corbett in which Corbett advised Grace of the December 19 phone call from Cole. Grace stated that Corbett informed him that Cole wanted DTE to comment about Michigan jobs being moved to Ohio due to the contract with Norfolk Southern.

During the investigation hearing, Cole stated that he contacted DTE on December 19 in his capacity as a SMART union official to investigate Grace's comments that DTE required Norfolk Southern to move jobs from Detroit to Swanton, Ohio, and asked Corbett to "confirm or deny" Grace's comments. Cole also stated that he was "doing [his] due diligence" for a civil lawsuit that Norfolk Southern had filed against SMART and him.[1]

On January 4, 2017, before the termination of his employment, Cole sent an email to Corbett, reiterating that the reasons for his December 19 phone call to DTE were "to do [his] due diligence and give DTE the chance to respond to" Grace's comments that DTE required Norfolk Southern to move jobs to Ohio. On January 18, 2017, after the termination of his employment, Cole sent another email to Corbett, once again reiterating that the purpose of his December 19 phone call to DTE was to offer DTE an "opportunity to confirm or deny" Grace's comments that DTE required Norfolk Southern to move jobs to Ohio and use Toledo-based crews for its contract with Norfolk Southern. Neither email stated that Cole contacted Corbett on December 19, 2016, to discuss safety concerns. Only later, in his August 2018 deposition, did Cole say that he conveyed safety concerns to Corbett.

[1] Norfolk Southern filed a federal civil suit on December 7, 2016, against SMART, Cole, and others to resolve a labor dispute between Norfolk Southern and the defendants concerning Norfolk Southern's plan to use Toledo-based crews for its contract with DTE.

Summary decision was appropriate on this record. Cole's retaliation claim required him to show that his "employer knew that he engaged in protected activity." *Consol. Rail Corp.*, 567 F. App'x at 337. The record lacks any evidence that Cole or anyone else informed Norfolk Southern before Cole's discharge that Cole had reported his safety concerns to DTE. Because there is no evidence that Norfolk Southern believed that Cole expressed any safety concerns in his December 19 phone call to Corbett, that act could not have contributed to Cole's termination. We thus need not decide whether a dispute of fact exists over whether Cole had in fact relayed safety concerns to Corbett. Even if he did, there is no evidence that such protected activity contributed to his termination. The ARB properly upheld the ALJ's summary decision in favor of Norfolk Southern because Cole failed to create a genuine issue of fact with regard to his retaliation claim under the FRSA.

Cole's contrary arguments lack merit.

Cole argues that the ARB improperly weighed the evidence when concluding that he lacked "a good faith belief" that DTE had authority to remedy his safety concerns. He argues that his good faith belief that DTE had authority to address his safety concerns was based on Grace's comments that DTE required Norfolk Southern to use Toledo-based crews, but that the ARB relied on contradictory evidence that Norfolk Southern was the decision maker, revealing a disputed issue of material fact. But any dispute on this issue is not material to Cole's FRSA retaliation claim. Cole's good faith belief that DTE had authority to address his safety concerns is immaterial here because the record lacks any evidence that Norfolk Southern knew or suspected that Cole informed Corbett of any safety concerns that DTE could address or correct during the December 19 phone call.

Cole also argues that a material dispute of fact exists over whether he expressed his safety concerns to Corbett during the December 19 phone call, pointing to his 2018 deposition testimony. For the same reasons, any fact dispute over this issue is immaterial to Cole's FRSA claim.

Cole contends that because he expressed safety concerns regarding the use of Toledo-based crews to Norfolk Southern before his phone call to Corbett, Norfolk Southern "should have known or suspected" that he discussed his safety concerns with Corbett. But Cole first raised the territorial safety concerns to Norfolk Southern in July 2016—four months before the conversation with

Corbett. Although Cole alleges he mentioned his concerns again in September and December, he did so during meetings in which various union members raised numerous grievances related to their collective bargaining agreement. Under these circumstances, Cole's contention that Norfolk Southern must have suspected that Cole specifically raised concerns about the Detroit crew's safety qualifications to Corbett is speculative. "A properly supported motion for summary judgment will not be defeated by conclusory allegations, speculation and unsubstantiated assertions." *Bradley v. Wal-Mart Stores E., LP*, 587 F. App'x 863, 866 (6th Cir. 2014); *see also Lemon v. Norfolk S. Ry. Co.*, 958 F.3d 417, 420 (6th Cir. 2020).

In his reply brief, Cole argues that reliance on Corbett's email to Grace to support the summary decision in favor of Norfolk Southern is improper because the email is hearsay. But Cole did not assert this argument in his opening brief, so the issue is forfeited. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008). Cole also argues that statements from his witnesses were unfairly restricted at the investigation hearing because they did not have information concerning his phone call to Corbett. But the hearing was limited to Cole's "particular responsibility, if any, in connection with [his] conduct" during the December 19 phone call with Corbett, and he does not specify what information his witnesses were prevented from providing that either related to that issue or would have made a difference in the outcome of the investigation.

Accordingly, we **DENY** the petition for review.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk