



Issue Date: 31 August 2012

ARB Case No: 10-073

ALJ Case No.: 2010-CPS-00001

In the Matter of:

THOMAS SAPORITO, *pro se*,

Complainant,

v.

PUBLIX SUPER MARKETS, INC., et al.,

Respondents.

SUMMARY DECISION AND ORDER - DENYING COMPLAINTS

The above matter is a complaint of employment discrimination under Section 219 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), 15 U.S.C. §2087¹, and is governed by its implementing regulations at 29 CFR Part 1983.² The case was referred to the Office of Administrative Law Judges for formal hearing upon the January 5, 2010 appeal by Complainant of the December 10, 2009, Occupational Safety and Health Administration determination which dismissed that the Complainant's complaints because the complaints "are not covered by CPSIA and cannot be pursued by CPSIA" (OSHA Case No. 4-1050-09-076).

FILED COMPLAINTS

In his original complaint dated September 14, 2009, the Complainant alleged five episodes of protected activity under CPSIA.³ In his "Complainant's Supplemental Complaint of Retaliation

¹ References within §2087 to "this chapter" includes the Consumer Product Safety Act of October 27, 1972 as amended (CPSA).

² The CPSIA was enacted on August 14, 2008 with §2087 being effective on August 14, 2008. The interim final regulations were effective August 31, 2010; 75 Fed. Reg. 53533 - 53544. Final regulations were effective on July 10, 2012; 77 Fed. Reg. 40494 - 40509.

³ See 15 USC §2080(a)

Against Respondents⁴” dated September 30, 2009, the Complainant⁵ expanded on the alleged protected activity under the CPSIA as follows –

1. “On or about December 8, 2007, [he] complained to [six named individuals] about CPSIA concerns related to the cleaning of the empty case conveyor system at the plant [and] raised the issue of Publix product containers becoming contaminated with chemical used on the conveyor systems at the Publix manufacturing facility [because] these chemicals could reach the consumers through transport of the chemical on product containers purchased by consumers and possibly injuring consumers.”
2. “On December 16, 2007, [he] complained to ... the Quality Assurance manager ... related to contamination of the drainage system for the overhead empty case conveyor system ... failure of associates ... regarding wearing of hairnets ... that the culture of the plant had become complacent ... regarding the use of wood pallets taken into the processing areas of the plant ... related to footbaths that were not properly maintained ... [where] each of these concerns ... could have resulted in contamination of the Publix packaging containers purchased by consumers and possibly injuring the consumers.”
3. “On December 20, 2007, [he] complained to [six named individuals] about ... concern related to the use of Sani-Glide, that the chemical is extremely corrosive and toxic to humans and to the environment and that this toxic chemical could reach Publix consumers via transport on product containers purchased by consumers and possibly injuring the consumers.”
4. “On August 24, 2008, [he] complained to [the Plant manager] ... that associates were not wiping tool or completing documentation [under HACPP] ... [which raised the concern] that consumers could be injured from contamination of Publix product containers purchased by consumers.”
5. “On September 29, 2008, [he] complained to [three named individuals] ... related to the pressurization of the milk filling room to ensure that product is not contaminated from bacteria and the like coming from the empty case room into the filling room ... [such that] consumers would be injured from contamination of Publix product containers purchased by consumers.”

He also alleged seven retaliatory acts against him as a result of filing whistleblower complaints. Subsequent complaints filed October 8, 2009, October 14, 2009, and October 30, 2009, November 30, 2009 cited previous complaints under the Sarbanes-Oxley Act of 2002 (SOX) identified as OSHA Case No. 4-1050-09-077 and under the Occupational Safety and Health Act (OSHA) identified as OSHA Case No. 4-1050-09-078. No new allegations of protected activity under the CPSIA were set forth in the October complaints though he further refined the language of his alleged protected activity and added three more allegations of retaliation. In his November 3, 2009 complaint the Complainant alleged his employment had been terminated due to his protected activity under SOX, OSHA, and the CPSIA. In his November 30, 2009, complaint, the Complainant set forth his duties as a Maintenance Technician Class “A” as well as his hourly rate of pay and additional statements in support of his complaints.

⁴ The complaints and supplements thereto indicate that the Complainant filed simultaneous complaints under the Consumer Products Safety Improvement Act (OSHA Case No. 4-1050-09-076), the Sarbanes-Oxley Act of 2002 (OSHA Case No. 4-1050-09-077) and the Occupational Safety and Health Act (OSHA Case No. 4-1050-09-078). Only the determination entered in OSHA Case No. 4-1050-09-076 is the subject of the current remand by the Administrative Review Board.

⁵ Documents filed by the Complainant and the Area Director for the U.S. Department of Labor, Occupational Safety and Health Administration, Fort Lauderdale Area Office, indicate that the Complainant was employed by Respondent as a Maintenance Technician, Class A, in the dairy production area of a facility located in Deerfield Beach, Florida from July 24, 2007 through November 3, 2009.

PROCEDURAL HISTORY

On March 5, 2010, this Administrative Law Judge issued a “Recommended Determination and Order Retaining Jurisdiction for Action Under 15 U.S.C. §2087(b)(3)(C)⁶ and Dismissing Complaint”. On April 13, 2010, this Administrative Law Judge issued a “Recommended Determination and Order Awarding Attorney Fees pursuant to 15 U.S.C. §2087(b)(3)(C).” Both Recommended Decisions and Orders were appealed to the Administrative Review Board.

On March 28, 2012 the Administrative Review Board issued a “Decision and Order of Remand.” The Administrative Review Board stated “our ruling is narrow” in reversing conclusions of law related to protective activity and “limiting ourselves to two distinct bases ... lack of Commission jurisdiction and speculative complaints.” The remand file was received in this office on May 29, 2012. A “Scheduling Order on Remand” was issued on June 14, 2012.⁷

On June 20, 2012, Respondent’s counsel served its Motion for Summary Decision and Motion to Suspend or Limit Discovery by mail on the Complainant, Complainant’s appellate counsel and Department of Labor representatives. The Motions were filed with the Court on June 21, 2012. Respondent’s counsel submits that the Complainant was not subjected to adverse employment actions for reporting various safety and health concerns prior to his employment termination on November 3, 2009 and that his employment termination was for dishonesty arising out of the Complainant performing hot work outside a designated hot work area on October 26, 2009, failing to complete a hot work permit prior to performing hot work on October 26, 2009, failing to move flammable material from the proximity of the hot work area, not conducting a mandatory thirty-minute fire watch for the hot work performed, falsifying times on a hot work permit, and making numerous false statements to investigating supervisors about his October 26, 2009 hot work activity.

On June 26, 2012, Complainant’s appellate counsel filed a Motion to Withdraw as Counsel. Counsel averred that “Counsel and Appellant previously communicated regarding the relief requested herein and thus Appellant is aware of Counsel’s intention to seek withdrawal in this matter.” By Order of July 3, 2012, Complainant’s appellate counsel’s Motion to Withdraw was granted, as was Respondent’s Motion to Suspend Discovery pending a determination on the Respondent’s Motion for Summary Decision.

After close of business on July 3, 2012,⁸ Complainant’s appellate counsel filed, by facsimile transmission, a “Motion for Extension in Time to Respond to Respondent’s Motion for Summary

⁶ This involves awarding attorney fees to Respondent under certain circumstances.

⁷ The Scheduling Order on Remand set forth the alleged complaints, decisional framework under CPS §2087, issues to be addressed, and dates to identify relevant individuals and documents, complete discovery, exchange exhibits and exhibit lists, submit dispositive motions for decision prior to hearing, file prehearing statements, and file availability dates for a formal hearing. Complainant was directed to promptly notify the Court of the name of his representative should he retain a representative. The Parties were specifically advised that a response to a dispositive motion, with supporting documents, must be filed within 10 calendar days of receipt of the motion and that “FAILURE TO TIMELY FILE A RESPONSE TO A DISPOSITIVE MOTION MAY RESULT IN THE DISPOSITIVE MOTION BEING GRANTED AND CASE PROCEEDINGS BEING TERMINATED.”

⁸ July 4, 2012 was a Federal holiday. Accordingly, the facsimile document was effectively filed on July 5, 2012. 29 CFR §18.3(e)(7)

Decision.” Appellate counsel avers that the Complainant received Respondent’s Motion for Summary Decision on June 25, 2012; that counsel had not received a ruling on its Motion to Withdraw as Counsel; that the Complainant was previously “advised to seek new counsel”; and that “thus far, discovery has not been conducted in this matter.” He reported that the “Complainant seeks to extend the schedule for a response to Respondent’s Motion for Summary Decision for a minimum of 60 days, through and including September 3, 2012 and to extend the schedule for the disclosure for the discovery of documents and persons with information to September 11, 2012.” The “Motion for Extension in Time to Respond to Respondent’s Motion for Summary Decision” was denied by Order of July 5, 2012. However, all Parties were advised in the July 5, 2012 Order that “all matters received prior to a decision on a Motion for Summary Decision being issued are considered during deliberation on the Motion.”

On July 9, 2012, Complainant filed “Complainant’s Notice of Address Change and Complainant’s Motion to File Response Out-of-Time” by facsimile transmission.⁹ Complainant avers “Complainant was recently advised by his former counsel that Complainant’s legal representation had ended in the above captioned matter and that Respondents have filed a Motion for Summary Decision ... for which this Court denied Complainant’s former counsel an extension of time to file a response to Respondent’s motion.” He avers that he “has been attempting to retain alternate legal representation in the instant action. However, to date, Complainant has not been able to obtain alternate legal representation in this matter.” He sought a delay in time to respond to Respondent’s Motion for Summary Decision so that he can engage in discovery prior to responding. By Order issued the same day, July 9, 2012, “Complainant’s Motion to File Response Out-of-Time” was denied and the Complainant was again advised that “all matters received prior to a decision on a Motion for Summary Decision being issued are considered during deliberation on the Motion. Should Complainant file a response prior to a Decision and Order being entered on Respondent’s Motion for Summary Decision, such response will be considered.” The July 9, 2012 Order was sent to the Complainant on July 9, 2012 by certified mail at the address he indicated in his July 9, 2012 filing was his effective address for the proceedings¹⁰. That certified mail was returned by the U.S. Postal Service on August 8, 2012 with the notation “Return to sender. Unclaimed. Unable to forward.” A copy of the July 9, 2012 Order sent to the same address by first class mail has not been returned to this Office.

As of the date of this Decision and Order the Complainant has failed to notify the Court of the name and telephone number of any representative retained by him as directed in the June 14, 2012 Order. He has also failed to file a response to Respondent’s Motion for Summary Decision despite notice of the need to file a response within 10 calendar days of receipt and the possible adverse result of such action as set forth in the June 14, 2012 Order and the advice that any material filed prior to the Decision and Order being issued would be considered by this Administrative Law Judge, as set forth in the July 5, 2012 Order and the July 9, 2012 Order.

⁹ Facsimile transmission on non-business day, Sunday, July 8, 2012. Pursuant to 29 CFR §18.3 and §18.4, the next business day, Monday, July 9, 2012 is considered the date of filing.

¹⁰ A copy of “Complainant’s Notice of Address Change and Complainant’s Motion to File Response Out-of-Time” was received by first class mail on July 12, 2012. The envelope bore the Complainant’s new address of record and a July 9, 2012 date stamp.

DECISIONAL FRAMEWORK

This complaint is based on actions occurring in Florida, which is within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit.

The “whistleblower protection” provisions of §2087 of the CPSIA were effective as of August 14, 2008 and provides, in pertinent part:

“(a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee’s initiative or in the ordinary course of employee’s duties (or any person acting pursuant to a request of the employee) –

- (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter¹¹ **or any other Act enforced by the Commission**¹², or any order, rule, regulation, standard, or ban under any such Acts;
- (2) testified or is about to testify in a proceeding concerning such violation;
- (3) assisted or participated or is about to assist or participate in such a proceeding; or,
- (4) objected to, or refused to, participate in any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under such Acts.”

For the purposes of the Act the term “consumer product” means (15 USC §2052(a)):

“any article, or component thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; **but such term does not include** –

- (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,
- (B) tobacco and tobacco products,
- (C) motor vehicles or motor vehicle equipment ...,
- (D) pesticides ...,
- (E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code ...,
- (F) aircraft, aircraft engines, propellers, or appliances ...,
- (G) boats ... vessels, and appurtenances to vessels ...,
- (H) drugs, devices, or cosmetics ...,
- (I) **food. The term ‘food’ as used in this subparagraph means all ‘food’, as defined in section 201(f) of the Federal Food, Drug, and Cosmetics Act [21 USC 321(f)], including poultry and poultry products (as defined in sections 4(e) and (f) of the Poultry Products Inspection Act [21 USC 453(e) and (f)]), meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 USC 601(j)], and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 USC 1033]).**”

The purpose of Consumer Product Safety Chapter 47 includes (1) protection of the public against unreasonable risks of injury associated with consumer products, (2) assisting consumers in

¹¹ U.S. Code, Title 15, Chapter 47 (Consumer Product Safety chapter of the Commerce and Trade title)

¹² Consumer Product Safety Commission, 15 USC §2053

evaluating the comparative safety of consumer products, (3) developing uniform safety standards for consumer products, and (4) promoting research and investigation into the cause and prevention of consumer product-related deaths, illness, and injuries; 15 USC §2051(b).

The Consumer Product Safety Commission (CPSC) also enforces the Children's Gasoline Burn Prevention Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Refrigerator Safety Act and the Virginia Graeme Baker Pool and Spa Safety Act. The CPSC has no authority under the CPSIA to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act, the Atomic Energy Act, the Clean Air Act, or Public Health Service Act as related to electronic product radiation, 15 USC §2080(a). There are also limits on actions relating to the risk of cancer, birth defects and gene mutations from a consumer product, 15 USC §2080(b).

The Respondent has requested the case be dismissed through summary decision. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law, 29 CFR §18.41. The moving party bears the burden of establishing that there is no genuine issue of material fact when the material submitted for consideration is viewed in a light most favorable to the non-moving party. The non-moving party may not rely upon allegations alone but is extended the opportunity to submit documentary evidence in support of the stated allegations. *Celotex Corp. v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986).

In order to establish a prima facie case under the CPSIA, the Complainant must show, by a preponderance of the evidence when viewed in a light most favorable to him, that (1) he was an employee of a covered Respondent at the time of the adverse employment action; (2) he engaged in "protected activity" by providing information or a complaint to a covered supervisor or other individual authorized to investigate and correct misconduct where such information or complaint regarded conduct that the Complainant reasonably believed constituted a violation of the CPSIA or one of the other statutes enforced by the CPSC; (3) the covered Respondent knew, actually or constructively, of the "protected activity"; (4) the covered Respondent discharged the Complainant or took another unfavorable personnel action against him; and (5) a causal connection existed making it likely that the protected activity resulted in the alleged discrimination. The Complainant must show not only that he believed that the described conduct constituted a violation; but also, that a reasonable person in his position would have believed that the described conduct constituted a violation. General inquires do not constitute protected activity. The Respondent's described conduct which constitutes the violation of the CPSIA or one of the statutes enforced by the CPSC must have already occurred or be in the progress of occurring based on circumstances that the Complainant observes and reasonably believes at the time the information or the complaint was provided. See *Hall v. Department of Labor*, 476 F.3d 847 (10th Cir. 2007); *Sasse v. U.S. Department of Labor*, 409 F.3d 773 (6th Cir. 2005); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995); *Williams v. U.S. Department of Labor*, 157 Fed. Appx. 564 (4th Cir, 2005) *unpub*; *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998); *Miller v. Thermalkem, Inc.*, 94 F.3d 641 (4th Cir. 1996) *unpub*, citing *Ross v. Communications Satellite*

Corp., 759 F.2d 355 (4th Cir. 1985); *Valley Sewerage Commissioners v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993).

While the Complainant need not cite a code section he believes was violated in his communication to the supervisor or other individual authorized to investigate and correct misconduct, the communication must identify the specific conduct that the employee reasonably believes to be illegal, even if it is a mistaken belief. The communication only involves what is actually communicated to the employer prior to the unfavorable employment action. See *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008)

If the employee establishes a prima facie case, the burden shifts to the employer to provide sufficient evidence that the adverse action was taken for a legitimate, nondiscriminatory reason; that is, the evidence raises a genuine issue of fact as to whether it discriminated against the employee. If the issue is raised, the complainant must show by a preponderance of the evidence that legitimate reasons offered by the employer were actually a pretext for discrimination. “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Texas Department of Community Affairs v. Burdine*, 450 US 248, 253; 101 S.Ct. 1089, 1093 (1981); *Williams v. U.S. Department of Labor*, supra, at 569; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 US 133; 120 S.Ct. 2097 (2000).

“If the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior” which constituted the activity protected by §2087(a) of the CPSIA, relief may not be granted the Complainant, 15 U.S.C. §2087(a)(2)(B)(iv); 29 CFR §1983.109(b). The complaint must be denied, 29 CFR §1983.109(2).

SUMMARY OF SUBMITTED PLEADINGS, AFFIDAVITS AND DOCUMENTS

I. Submissions by Respondent:

a. *Plant Safety Officer Don Hustey (Attachments 1, 7)*

(Attachment 1) In his October 23, 2009 statement D. Hustey reported he was the Plant Safety Officer for approximately 6 of the 18 years he had been working at the Publix Super Market, Inc., Deerfield Dairy Plant. He was responsible for all safety program plans and activities, including safety standards and procedures record keeping, reporting, compliance audit, inspection, monitoring and training. The Complainant received his mandatory entry safety training in 2007.

D. Hustey reported that Publix maintained a written “Hot Work Policy” for work involving an open flame or which produces heat or sparks, such as brazing, cutting, grinding, soldering and arc welding. He summarized that a fire watch may be required under the “Hot Work Policy” while the work is being performed based on the worker’s evaluation of the work being performed and the potential fire hazards in the area. After the Complainant complained about hot work being performed by another worker on October 29, 2008, The Deerfield Plant Manager,

M. Melville issued a directive to all employees that required a fire watch to be posted before and during all hot work activity. He attached a copy of the Hot Work Policy to his statement (Exhibit B)

D. Hustey reported that he maintains and enforces a strict policy regarding Lock Out-Tag Out (LOTO) procedures for work on electrical equipment. He stated that the Complainant completed LOTO training on July 25, 2007 and attended supplemental training on September 3, 2009. He indicated that the serious nature of a LOTO violation, a first time violation results in a minimum final written warning and a second violation results in immediate discharge. He investigates all alleged LOTO violations and reports his findings to plant management. He stated that he investigated all of the Complainant's allegations of LOTO violations and all but one were unsubstantiated. The one which had merit was corrected by Mr. Hustey. He attached the LOTO policy to his statement (Exhibit C and E).

D. Hustey reported that employees are actively encouraged to bring safety complaints to him or plant managers. Each department has "Safety Leaders" appointed to that position for six-month terms, who conduct weekly departmental safety audits and file written reports on all identified safety hazards and concerns. They promote rank-and-file safety awareness and broad commitment to safety compliance in plant departments. He reports that "no [employee] has ever been disciplined for bringing a safety-related concern to my attention or to the attention of any other manager."

D. Hustey reported that on September 9, 2009, the Complainant reported that his entire work cart was smashed and overturned and requested pictures be taken. Mr. Hustey accompanied the Complainant to the area and took pictures and included them with his statement (Exhibit F). He examined the area and concluded that one of the forklifts had likely struck the unstable work cart causing it to tip over accidentally. He recommended that the forklift stop be bolted to the floor to prevent such accidents from happening in the future. He reported the Complainant "acknowledged that the incident was probably the result of an unintended accident because the forklift stop was not bolted down" and bolted the forklift stop to the floor.

D. Hustey opined that the Complainant's allegation of a hostile work environment were the result of the Complainant's "attention grabbing activity - and misrepresentation of the facts" involving co-workers that has alienated the co-workers. He gave an example of the Complainant reporting a stairwell exit light not illuminating during a power failure because a specific co-worker did not want to approach Mr. Hustey. Mr. Hustey reported he approached the co-worker who denied he did not want to report the light problem and that the Complainant had overheard his report of the problem to another and then took credit for the safety concern without his knowledge.

D. Hustey reported that "on several different occasions [the Complainant] has told [him] and other co-workers and management about the numerous whistleblower complaints he has filed against previous employers ... [and] also provided [Mr. Hustey] with copies of the legal briefs he has written in those cases, even though I have never asked for them."

(Attachment 7) In a March 30, 2010 statement Mr. Hustey reported that he was not at work the night of October 26, 2009; but that when he returned to work on October 27, 2009, he met with Mr. Vitale and opened the lock box for hot work permits forms and found that there was no permit for hot work completed by the Complainant for hot work the night of October 26, 2009. He reported that when he checked the lock box for hot work permits on October 28, 2009, there was a permit for the October 26, 2009 hot work by the Complainant.

Mr. Hustey reported that the insurance company required minor changes to the company's hot work policy and permits. The initial training was conducted October 21, 2009 with a make-up session on October 28, 2009. The Complainant attended the October 28, 2009 session. He stated that "no change was made to the requirement that the [employee] sign the hot work permit designating that he had issued the permit, cancelled the permit and had conducted a fire watch. The new permit forms were distributed after training on October 28, 2009 and provided that the older version, used before the required minor changes to the form were made, could be used until the supply was exhausted. He restated that "Publix delegates responsibility to its [employees] to conduct Hot Work and to ensure that proper safety precautions are followed during that Hot Work." He attached a copy of the revised October 28, 2009 distributed Hot Work Permit form CH0070 (6-09), the prior Hot Work Permit form CH0070 (10-05) and a Hot Work Permit submitted by the Complainant on form CH0070 (6-09). (Exhibits B, A, and D respectively). He identified Exhibit D as the Hot Work Permit submitted by the Complainant on October 28, 2009 on a hot work form distributed after the October 28, 2009 training session.

The "Publix – Hot Work Permit" identified as Exhibit D contains the following information: permit # 2009-709; work order # P1279530; Complainant's signature and date of October 28, 2009 under the certification to perform the hot work according to the procedures on the back of the form; the task was performed in/on P3; the permit was issued by the Complainant at 0230, October 28, 2009 and cancelled by the Complainant at 0330, October 28, 2009; a fire watch was posted during the hot work and 30 minutes after completion of the task from 2:30 to 0400; and the signatures of the Complainant and one Peter Lance in the block concerning posting of the fire watch. The second page indicated by initials that the Complainant represented completing almost all of the listed required hot work procedures before, during and after the hot work was performed. The permit is on form CH0070 (6-09). This Exhibit D is different from the Hot Work Permit submitted by J. Zebendon in Attachment 7, Exhibit D which reflects hot work purportedly performed on October 26, 2009 on form CH0070 (5-08). Upon review of the evidence as a whole, this Administrative Law Judge finds that Attachment 7, Exhibit D is not related to the October 26, 2009 hot work incident involving the Complainant and is given no weight.

b. Support Associate Relations Manager John Zebendon (Attachments 2, 8, 11)

(Attachment 2) In his October 23, 2009 statement J. Zebendon reported that he has been the Support Associate Relations Manager in Publix Super Market Human Resource Department since 2004. He stated that Publix is a 100% employee-owned corporation that utilizes a progressive discipline policy. The first level is a documented "coaching" event where an employee receives an informal warning or discussion on the procedure violated or the wrong action taken by the employee with a goal of to achieve desired quality of performance by the

employee. "Oral counseling" is the next level if an employee commits the same or similar violation. A "written warning" is the third level for failure to rectify a situation or commission of a similar violation. "Final Written Warning" is the fourth level and is followed by termination of employment if the underlying situation is not rectified. J. Zebendon reported that there are some violations that are considered so serious that discipline may occur in an order different from the progressive discipline policy. Violation of the LOTO (lock-out / tag-out) policy is one such serious violation.

J. Zebendon reported that Publix has an "open door" policy which actively encourages employees to report all concerns, including safety, to their immediate supervisor; and, if the matter is not resolved to the satisfaction of the employee, the employee is encouraged to pursue relief up the proper chain of command until resolved. He stated that the Complainant had reported the concerns noted in his complaints to him and requested J. Zebendon investigate them. He stated that on each occasion he advised the Complainant "that he would not be retaliated against for using Publix's open door policy to report a legitimate work-related concern."

J. Zebendon reported he investigated the November 30, 2008 stairwell exit light not illuminating during a power failure which the Complainant alleged resulted in a hostile work environment. He reported his investigation revealed B. Knott originally noticed the emergency lighting failure and told the Complainant approximately 20 minutes before a scheduled safety meeting. The Complainant then sent off an e-mail to D. Hustey, M. Melville, T. Schell and J. Vitale about the lighting before B. Knott could report the lighting failure at the safety meeting. He reported that D. Hustey had approached B. Knott after the Complainant reported the lighting failure by e-mail. B. Knott had not asked the Complainant to report the lighting failure and was upset that the Complainant had reported the concern before he could. M. Melville suggested to the Complainant he apologize to B. Knott. He concluded in his investigation that D. Hustey did not act maliciously or retaliate against the Complainant because of his e-mail report and that M. Melville did not retaliate against the Complainant when he suggested he apologize to B. Knott.

J. Zebendon reported he investigated the Complainant's allegation of retaliation by J. Vitale for failure to respond to maintenance calls on or about July 16, 2009. He reported that R. Faye and R. Nieves has separately requested maintenance assistance from the Complainant at that time and were ignored by the Complainant. Based on his investigation he concluded that the Complainant "should be counseled for this incident" and reviewed the draft counseling statement prepared by J. Vitale and sent to him and M. Melville. Exhibit D reflects that the Complainant received oral counseling for failure to respond to the maintenance requests of July 1, 2009.

J. Zebendon reported the Complainant complained to him at least twice that J Vitale was retaliating against him by giving him disciplinary coaching for failure to respond to maintenance calls in the ice room. He stated his investigation revealed that "the ice room had called for maintenance assistance approximately eight times at approximately 3 a.m. on August 23, 2009" and was non-operational for approximately two hours as a result of the incident where multiple telephone calls for maintenance were answered by E. Pariso who in turn called the Complainant. Additionally, a member of the ice room personally asked the Complainant to help. He determined that the Complainant "should be coached for his failure to respond promptly to maintenance calls." He notified the Complainant of the results of his investigation on September

11, 2009; of his recommendation for coaching; of finding no retaliation; and of his freedom to file a complaint with OSHA free from retaliation if he made such a complaint. Exhibit D indicates that the Complainant received a final written warning on September 9, 2009 from J. Vitale for the Complainant's failure to respond to the maintenance assistance requests from the ice room on August 23, 2009. Exhibit E was J. Zebendon's September 11, 2009 e-mail to the Complainant on the results of the investigation in which he refers to the ice room incident as occurring on August 24, 2009, vice August 23, 2009. In the attached exhibit, J. Zebendon reminded the Complainant of the Publix open door policy and who next to escalate any concern and that he was free to notify OSHA of perceived safety concerns or perceived retaliation and he would not be retaliated against for filing a complaint with OSHA.

(Attachment 8) In his November 16, 2009 statement, J. Zebendon reported he received an e-mail from J. Vitale on October 27, 2009 indicating the Complainant had been observed the previous night using welding equipment to separate a replacement segment of chain immediately outside J. Vitale's office and requested J. Zebendon investigate the occurrence. He reported his investigation indicated that the required Hot Work Permit for the October 26, 2009 work by the Complainant was not filed until October 28, 2009; that the permit required removal of combustibles from the area of hot work, the presence of a fire extinguisher, elimination of an explosive atmosphere, clearing the area of equipment and product, proper ventilation and use of equipment and personal protective gear in good repair; that the permit completed by the Complainant on October 28, 2009 indicated the Complainant had conducted a 30 minute fire watch from 8:15 to 8:45 pm. (Exhibit D – this hot work permit is different than that submitted as Attachment 1, Exhibit D)

J. Zebendon reported that his investigation revealed the Complainant did not begin work on October 26, 2009 until 10:00 pm. He also reviewed security camera footage of the work area from 9:45 pm to 11:45 pm, October 26, 2009 and determined that contrary to the Complainant's representations, the Complainant "had not removed any flammable liquids, oily deposits, or combustible materials from the area prior to conducting the hot work, nor had he cleared the area of equipment or product"; the Complainant completed his hot work at 10:59 pm; and the Complainant "did not conduct a fire watch at all upon completion of the hot work." He then drafted a series of questions to ask the Complainant in the presence of M. Melville (Exhibit E). He reported that at 5:10 am, November 3, 2009, the Complainant was interviewed by M. Meville in his presence and asked the questions he prepared (Exhibit E).

The "Publix – Hot Work Permit" identified as Exhibit D does not have a permit number nor a work order number. It indicates the Complainant issued the hot work permit at 2000 hours on October 26, 2009 for the purpose of cutting chain in the main storage area; the permit was cancelled at 2012, October 26, 2009; and that the Complainant acted as fire watch from 2015 to 2045. It was completed on form CH0070 (5-08).

(Attachment 11) In his March 29, 2010 statement, J. Zebendon reported that his "responsibilities include the conduct of workplace investigations, including allegations of discrimination arising under the various equal employment statutes. At no time in the history of my employment with Publix or prior have I ever been accused of unlawful discrimination – other than by [the Complainant]. His allegations against me are totally without merit. Based upon the results of

my investigation, his allegations against Publix and the other named individuals are equally without merit.”

J. Zebendon reported that Chapter 3 of the “Publix’s Associate Handbook” (Exhibit A) provided to the Complainant “states that ‘Any act of dishonesty may result in discipline or you losing your job.’” He stated that after interviewing the Complainant on the October 26, 2009 hot work incident, he and M. Melville determined that “Publix’s Progressive Discipline Policy was inapplicable to this incident because the evidence contained in [the Complainant’s] Hot Work Permit, the videotape of his activities on the date and time in question, and his statements during the investigatory interview established the [the Complainant] had deliberately misrepresented the facts.” He reported that “where the facts establishing Associate dishonesty are clearly established, the Associate is subject to immediate termination because the company must be able to rely upon the Associate’s word that he or she has carried out his or her duties and responsibilities in compliance with established policies and procedures, particularly those relating to health and safety.”

J. Zebendon reported that the prior policy was to prohibit a terminated Associate from being rehired by Publix for a period of 12 months; but that effective April 16, 2010, the new policy would bar the rehire of a terminated Associate unless the previously terminated Associate is granted an exception by a Publix review board and a 12-month waiting period had passed.

c. Plant Engineer Tom Schell (Attachment 3)

In his October 23, 2009 statement, T. Schell reported he has 28 years of experience in plant engineering, with 18 years as an engineering manager in food manufacturing. He had been employed as Plant Manager for the Publix Super Market, Inc. Deerfield Dairy Plant for approximately one year at the time of his statement. He stated that sometime around September 2008 he was told the Complainant wanted Publix to purchase him a welding mask for his use because he believed OSHA regulations provided for that. He and D. Hustey determined there was no OSHA requirement for individual welding masks, but purchased two new welding masks and welding caps for each welder to use and instituted a policy for cleaning and sanitizing shared welding masks. The Complainant insisted he be provided an individual welding mask and completed a requisition form for a cost of \$30.00. T. Schell stated he investigated the request, found the cost to be \$400.00 and brought the price discrepancy to the Complainant’s attention. He indicated that no disciplinary action was taken due to the Complainant’s request for a welding mask or the mistake in recording the cost of the welding mask.

T. Schell reported that he signed the Complainant’s December 2008 performance evaluation for the July to December 2008 period after discussing the mid-annual review with J. Vitale since he had not been able to personally observe the Complainant during the entire performance period. He stated he considered the Complainant’s December 2008 performance evaluation as “quite positive as evidenced by comments regarding [the Complainant’s] positive attitude and ability to work well with others.”

T. Schell reported that he did not investigate the Complainant’s July 6, 2009 allegation that he was harassed by J. Vitale by falsely accusing him of failing to do maintenance in the Empty Case

and Blow Mold rooms because J. Vitale discussed the matter with him prior to issuing a disciplinary report to the Complainant. He stated that he was aware that the Complainant refused to sign the disciplinary report and that the practice is to note the refusal to sign on the report. No separate disciplinary action is taken for refusing to sign the report and none was taken for the Complainant's refusal to sign the disciplinary report.

T. Schell reported that Publix uses a computerized maintenance work order system in which the Parts Department initiates a computerized report of those preventive maintenance orders that are overdue for completion. He stated that it is J. Vitale's responsibility to notify the maintenance technicians of their overdue maintenance assignments by placing the generated reports in their respective mailbox for completion. T. Schell stated that the Complainant's allegations that J. Vitale retaliated against him by making a false accusation that he had six overdue maintenance assignments on September 30, 2009 is false and that no disciplinary action was taken against the Complainant for the overdue preventive maintenance assignments.

T. Schell reported that Publix uses a Kronos computer system to record employee work hours and how they are paid. He stated that it was his responsibility as plant manager to review the Kronos reports to correct mispunches and submit the corrected form to payroll so that employees can be paid on time. The Complainant alleged management harassed him by falsely accusing him of mis-punches on his time clock. T. Schell reported that he reviewed the Kronos report related to the complaint as normal for payroll, noted three employees had mispunches, including the Complainant. He corrected the mispunches for all three employees and a new report was generated which informed the employees that the mispunches had been corrected. He stated that J. Vitale was not involved in that process.

T. Schell reported that all Publix employees are required to complete a Time Away From Work form (TAFW) by Monday morning for payroll completion when the employee has missed work. The employee indicates on the TAFW form the reason they were not at work. He stated he was notified on October 6, 2009 by the payroll department that the Complainant had worked only 24 hours that pay period and that 16 hours, two shifts, were not accounted for. He stated that he knew the Complainant was out of work on October 5, 2009 due to back pain and assumed that the October 6, 2009 absence was for the same reason. Since the Complainant and J. Vitale were not at work that day, he filled out a TAFW form on the Complainant's behalf and submitted it to payroll so that the Complainant would be paid on time. He was unaware that J. Vitale had agreed that the Complainant would have an "excused and approved" day off on October 6, 2009 when he submitted the TAFW form. On October 13, 2009 the Complainant informed him by e-mail of the October 6, 2009 time off and forwarded a completed TAFW form for the October 5, 2009 absence. The Complainant indicated that a TAFW form was not required for the October 6, 2009 absence since it had been approved by J. Vitale (Exhibit B). T. Schell confirmed the time off with J. Vitale and had the incorrect TAFW form for October 6, 2009 removed. He notified the Complainant the October 6, 2009 TAFW issue had been corrected and apologized to the Complainant twice for the October 6, 2009 error.

T. Schell reported that he received the Complainant's October 2, 2009 letter addressed to him (Exhibit C) which had PDF copies of various complaints the Complainant had filed. He stated he took no action on the letter since M. Melville had been copied and he believed J. Zebendon of

the Human Resources Department had received the letter. T. Schell reported he has not spoken with the Complainant about the October 2, 2009 letter or his complaints filed with OSHA. He reported that no disciplinary action had been taken against the Complainant for filing the OSHA complaints.

d. Plant Manager Mike Melville (Attachments 4, 9, 10)

(Attachment 4) In his October 22, 2009 statement, M. Melville reported that he has been employed by Publix Super Markets, Inc., for 18 years and has been the Plant Manager since 2005. He stated that as Plant Manger he is responsible to approve all hiring and termination decisions. When a person applies for employment there is a certification provision on the job application that states “if an applicant fails to answer a question, provides a misleading answer, or by failing to give complete information makes an answer misleading, Publix has the right to refuse to hire the applicant or to fire him or her if he or she has already been hired.” The Complainant signed such a certification when he was hired (Exhibit A).

M. Melville reported that the Complainant brought concerns about violations of OSHA involving fire watch posting by e-mail of August 29, 2008 (Exhibit B). He investigated the concern and issued a policy update on conducting fire watch to all employees (Exhibit C). He thanked the Complainant for bringing the issue to his attention and no adverse action was ever taken against the Complainant for reporting the fire watch safety concern.

M. Melville reported that he was aware that the Complainant had alleged he was subjected to a hostile work environment because he reported the failure of a stairwell exit light to illuminate during a power failure. The Complainant had complained to him in an e-mail (Exhibit D) that D. Hustey had shared the his reporting e-mail with coworker R. Knott and he was on the receiving end of coworkers expressing their displeasure with him reporting the incident before R. Knott had the opportunity to report it. M. Melville stated in his reply e-mail he told the Complainant that co-workers expressing displeasure with each other did not qualify as a hostile environment since he still had the same rights and accessibility as his co-workers and had the same tools, management support and equipment needed to do his job. He suggested the Complainant apologize to R. Knott for any slight his reporting the light failure may have caused R. Knott. He stated that the Complainant was free to accept or reject the suggestion and that the suggestion was not a retaliation but “a way of smoothing relations between technicians.” M. Melville stated that the Complainant rejected the idea of apologizing to R. Knott and maintained that his safety report was different than R. Knott’s safety report. M. Melville reported he reviewed the statement of D. Hustey and that it was consistent with his recollection of the light failure events. He stated that “no discipline or adverse action of any sort was taken against [the Complainant] as a result of his refusal to apologize” to R. Knott.

Exhibit E is the e-mail from the Complainant rejecting the suggestion to apologize to R. Knott. The Complainant indicated R. Knott’s safety concern was that the lighting in the stairwell leading to the break room had failed during emergency power testing and his report was that the associated stairwell exit light had failed to illuminate. The Complainant stated the central issue was D. Hustey sharing the e-mail report of the exit light with R. Knott that resulted in R. Knott’s negative reaction and verbal abuse directed towards him.

M. Melville reported the Complainant notified him on December 13, 2008 that a handle on the safety shower had been installed so that an employee had to push up on the handle to operate the shower rather than pull down. M. Melville stated he found no safety requirement to pull down on the handle but agreed with the Complainant that pulling down made more sense and had the handle reinstalled to operate by pulling down. He stated no adverse action was taken against the Complainant for raising the safety shower handle concern.

M. Melville reported he had reviewed the statements of T. Schell, J. Vitale and J. Zebendon and his recollection of the events was consistent with the respective statements.

(Attachment 9) In his November 16, 2009 statement, M. Melville reported that Publix's Hot Work Policy requires the individual performing the hot work to determine whether a fire watch is required, though management may require a fire watch and that a fire watch must last for 30 minutes following completion of the hot work.

M. Melville reported he received an e-mail on October 27, 2009 from J. Vitale indicating the Complainant had performed hot work next to his office instead of in a designated hot work area. He investigated the report by reviewing the Hot Work Permit completed by the Complainant (Attachment 8, Exhibit D). He stated he suspected the Hot Work Permit was not true as to the Complainant preparing the area for hot work and performing the fire watch between 8:15 and 8:45 PM since the Complainant did not begin work until 10:00 PM on October 26, 2009. He stated he reviewed the security camera video for the work area where the Complainant performed the hot work on October 26, 2009. The reviewed security video footage covered the two hour period surrounding the time the Complainant claimed the hot work and fire watch were performed. His review revealed the Complainant had not prepared the work area for hot work and had not performed a fire watch after performing the grinding.

M. Melville reported he conducted an interview of the Complainant on November 3, 2009 at 5:10 Am, with J. Zebendon present as a witness. He advised the Complainant at the beginning of the interview that he "expected and needed [the Complainant] to be totally honest in answering my questions" and the Complainant acknowledged this by nodding his head. He stated that in response to questions by him the Complainant replied that he remembered the incident of October 26, 2009; that when he was grinding links from a replacement chain J. Vitale cut his machine off and move to a designated working area; that he complied with moving to a designated work area; that he prepared the area before beginning hot work as reasonably achievable; that there were no flammable liquids in the area to remove; that he hadn't seen any barrels of oil in the area; that he had remove combustibles, specifically empty pallets; that he had not move other equipment; that he did not see any product around the area; that the work area was clean and did not need to be swept; that he did not use welding blankets; that there were no welding blankets in the plant; and that he had a fire extinguisher with him while performing the hot work. When shown a copy of the hot work permit for the October 26, 2009 hot work (Attachment 8, Exhibit D), the Complainant indicated that he had filled out the permit and it was his hand writing; that he had performed the fire watch as indicated on the permit; that he had "of course" conducted the fire watch uninterrupted as required by Publix's Hot Work Policy; that he had never left the work area during the fire watch. When questioned about the timing of the fire watch placed on the permit, the Complainant "admitted he must have written the incorrect times

on the Hot Work Permit but insisted that he had conducted the fire watch.” At the end of the interview the Complainant confirmed “that he had moved empty pallets to prepare the work area and that he had conducted the fire watch for thirty minutes after completing the hot work.”

M. Melville reported he reviewed the security camera footage for the work area from 9:45 PM to 11:45 PM October 26, 2009 since the Complainant began his work shift at 10:00 PM. His review of the video tape revealed that the Complainant never moved any pallets prior to beginning the hot work and that the location of pallets, equipment and combustibles remained the same throughout the two hour period. His review revealed the Complainant completed the hot work at 10:59 PM and did not perform the fire watch required until 11:29 PM. The Complainant was in the work area from 10:59 to 11:09 PM on an occasional basis to get a forklift to move chain to the designated work area and was not in the work area at any time between 11:09 and 11:29 PM, the period of the required fire watch. M. Melville concluded that the Complainant had not performed the required 30 minute fire watch after completing the hot work in an unsecured area.

M. Melville reported that he called the Complainant into his office at 6:30, November 3, 2009 “told him that I was discharging him for being dishonest during the investigation and for being dishonest on the Hot Work Permit. ... and told him that I had discovered he was dishonest when he stated that he had moved pallets in order to prepare the area ‘as reasonably achievable’ and when he stated he had conducted the Fire Watch for an uninterrupted thirty minutes following the Hot Work.” When the Complainant asked what evidence existed he was told “that video footage clearly showed that he had done nothing to prepare the area and did not conduct a Fire Watch.” M. Melville stated that the entire discharge meeting lasted less than five minutes and that the Complainant turned in his radio and badge and left without incident.

(Attachment 10) In his April 2, 2010 statement, M. Melville reported that he reviewed the October 26, 2009 security camera footage on two occasions. He stated the video footage shows “sparks being emitted during the time [the Complainant] was using a die grinder to attempt to grind links of chain apart at a rack outside Mr. Vitale’s office ... [which] is not a designated Hot Work area.” He indicated that the video footage does not show the Complainant obtaining a band saw from the parts department and that employees do not have to sign to remove tools from the parts department so there is no records of signing out tools from the parts department. He stated that he has not been involved in any previous actions alleging discrimination against Publix Super Markets, Inc.

e. Maintenance Assistant Department Manager Joseph Vitale (Attachments 5, 6)

(Attachment 5) In his November 16, 2009 statement, J. Vitale reported that he had been employed by Publix for 14 years and that his job for the past 2.5 years has been Maintenance Assistant Department Manager. His duties include supervising all third shift Class A maintenance technicians, including the Complainant.

J. Vitale reported that on October 26, 2009 he observed the Complainant “grinding the links of the [replacement] chain apart at the rack outside my office. The rack was adjacent to drums of oil and other combustible and flammable materials.” He stated that “because [the Complainant] was performing this work outside a designated Hot Work area and because there were

combustible and flammable materials located nearby, I believed [the Complainant's] actions constituted an immediate and serious safety threat. Therefore, I told [the Complainant] to stop work immediately and sent him to a Hot Work area to complete the job.”

J. Vitale reported that the replacement chain is kept in a rack next to his office and that the Complainant had been called to replace broken chain in the milk shipping area on October 26, 2009. He stated that Publix's Hot Work Policy requires a Hot Work Permit be filled out for each hot work job and placed in a locked box maintained by the Plant Safety Officer, D. Hustey. He reported he met D. Hustey at the lock box on the morning of October 27, 2009 to see if the Complainant had completed the Hot Work Permit and placed it in the lock box prior to the end of his shift. He reported the Complainant had not placed a permit in the lock box. He stated he considered the Complainant's actions “a blatant violation of Publix's Hot Work Policy.”

J. Vitale reported he sent an e-mail on October 27, 2009 (Exhibit A) to J. Zebendon, M. Melville and T. Schell “describing the incident, my conclusions and recommending that [the Complainant] be disciplined for failing to comply with Publix's Hot Work Policy.” (Exhibit A is the October 27, 2009 e-mail and is consistent with J. Vitale's November 16, 2009 statement.)

(Attachment 6) In his March 31, 2011 statement, J. Vitale reported “On the evening of October 26, 2009, I witnessed [the Complainant] using a die grinder to grind links of chain at a rack outside my office. I told [the Complainant] to immediately stop what he was doing. I told him to move to a designated Hot Work area and informed him that he could try to use a band saw or a torch to complete the work.”

II. Submissions by Complainant prior to November 3, 2009:

a. *September 14, 2009 Initial Complaint –*

In his initial complaint, the Complainant alleged he engaged in protected activity under CPSIA as follows:

1. “On or about December 8, 2007, [he] complained to [six named individuals] about CPSIA concerns related to the cleaning of the empty case conveyor system at the plant.”
2. “On December 16, 2007, [he] complained to ... the Quality Assurance manager ... related to contamination of the drainage system for the overhead empty case conveyor system ... failure of associates ... regarding wearing of hairnets ... that the culture of the plant had become complacent ... regarding the use of wood pallets taken into the processing areas of the plant ...related to footbaths that were not properly maintained.”
3. “On December 20, 2007, [he] complained to [six named individuals] about ... concern related to the use of Sani-Glide, that the chemical is extremely corrosive and toxic to humans and to the environment ... and raised a food safety concern about this chemical contaminating products sent out to the customers.”
4. “On August 24, 2008, [he] complained to [the Plant manager] about food safety concerns related to HACPP – that the Plant was not in compliance with that standard that associates were not wiping tool or completing required documentation.”
5. “On September 29, 2008, [he] complained to [three named individuals] about a food safety concern related to the pressurization of the milk filling room to ensure that product is not contaminated from bacteria and the like coming from the empty case room into the filling room.”

The Complainant listed thirteen areas of retaliation, not all of which were related to the CPSA or CPSIA. Those acts he broadly alleged within CPSA and CPSIA were:

1. Harassment involving “falsely accusing him of mis-punches on the time clock” on or prior to May 1, 2008;
2. A disciplinary report written on May 19, 2008;
3. A May 18, 2008 warning from a forklift operator;
4. A disciplinary meeting with Vitale and Rinehart with accusations of poor performance, around August prior to Schell’s hire at Publix;
5. False accusation on August 25, 2009 involving not responding to calls in the ice room and threat of a disciplinary report;
6. Receiving “disciplinary coaching about the ice room incident” on September 8, 2009; and,
7. “Entire work cart was smashed and left in disarray” on or about September 9, 2009.

b. September 30, 2009 Supplemental Complaint –

In his Supplemental Complaint, the Complainant enlarged on his Initial Complaint of protective activity by adding additional language to the five listed events to allege an impact on the public consumers.

1. Added to the December 8, 2007 allegation – “[and] raised the issue of Publix product containers becoming contaminated with chemical used on the conveyor systems at the Publix manufacturing facility [because] these chemicals could reach the consumers through transport of the chemical on product containers purchased by consumers and possibly injuring consumers.”
2. Added to the December 16, 2007 allegation - ... [where] each of these concerns ... could have resulted in contamination of the Publix packaging containers purchased by consumers and possibly injuring the consumers.”
3. Added to the December 20, 2007 allegation - and that this toxic chemical could reach Publix consumers via transport on product containers purchased by consumers and possibly injuring the consumers.”
4. Added to the August 24, 2008 allegation - [under HACPP] ... [which raised the concern] that consumers could be injured from contamination of Publix product containers purchased by consumers.”
5. Added to the September 29, 2008 allegation - ... [such that] consumers would be injured from contamination of Publix product containers purchased by consumers.”

The Complainant did not add to the areas of retaliation or further expand on the underlying events.

c. October 8, 2009 Supplemental Complaint –

In this Supplemental Complaint the Complainant listed two instances of alleged adverse/hostile action by Respondent’s supervisors:

1. Harassment on or about October 4, 2009, by “falsely accusing [the Complainant] of having ‘overdue pms’ ... [and assigning excessive work where] there is little chance [the Complainant] would ever be able to complete the assigned work orders.”
2. False accusation on October 7, 2009, “of mis-punching the time clock for the dates of September 2nd 2009 and September 4th 2009...”

The Complainant did not further expand on the underlying events.

d. October 14, 2009 Second Supplemental Complaint –

In this Second Supplemental Complaint the Complainant added another alleged adverse/hostile action by a Respondent supervisor as:

On or about October 13, 2009, a supervisor Schell prepared a “time away from work” document “that incorrectly documented [the Complainant’s] absence from work for two-days beginning October 5th and ending October 6th 2009, for the reason of ‘Back Pain’ ... without [the Complainant’s] prior knowledge, consent or approval ... [as an attempt] to set-up [the Complainant] for discipline and termination for alleged sick-leave abuse or TAFW unauthorized use.”

The Complainant did not further expand on the underlying events.

e. October 30, 2009 Third Supplemental Complaint –

In his Third Supplemental Complaint the Complainant referred to an October 28, 2009 blow-mold event not involving the Complainant and work performed in a confined work space, the ice room, not involving the Complainant. The Third Supplemental Complaint was related to OSHA safety issues and not issues under CPSA or CPSIA.

III. Submissions by Complainant on and after November 3, 2009:

a. November 3, 2009 Fourth Supplemental Complaint –

In his Fourth Supplemental Complaint the Complainant reported:

“On November 3, 2009, at about 5:30 a.m. without prior warning or notice, Complainant was summoned to Melville’s office where Melville and John Zebendon, a human resources representative were waiting. A very short meeting ensued where Melville questioned Complainant about hot work permit form related to a job Complainant had apparently been involved with on or about October 26, 2009, some nine days prior. Complainant was then asked to return to his work area which he did. Shortly thereafter, Complainant was again summoned to Melville’s office and accused of lying about certain questions presented earlier. Melville then fire Complainant and had Kevin Jenkins (Jenkins) escort Complainant out of the plant and collect Complainant’s badge and parking permit.”

Complainant stated he sought reinstatement, back wages, benefits, and damages as remedies in his case.

b. November 30, 2009 Fifth Supplemental Complaint –

In his Fifth Supplemental Complaint the Complainant set forth the job requirements of Maintenance Technician Class “A”, which included “Must have excellent safety work habits” as well as the position wage scale and benefits provided. He also stated:

“[He] was discharged by Melville on November 3, 2009, for the alleged reason of dishonesty related to the questioning by Melville about a hot work permit document apparently completed by [the Complainant] on October 26, 2009 and associated with a work request. The Complainant contends that he was discharged by Melville because of his protected whistleblowing activities during his employment in Publix in raising various safety concerns under the employee protection provisions within the meaning of each of the acts cited above.”

The Complainant listed a combination of allegations and complaint filing history involving his relationship with Respondent under the Corporate and Criminal Fraud Act / Sarbanes-Oxley Act

of 2002 (SOX), Section 11(c) of the Occupational Safety and Health Administration Act (OSHA), and Section 209 of the Consumer Product Safety Act. Those entries under the CPSIA included:

“7. On December 8, 2007, [the Complainant] sent Hustey an email with an attachment letter complainant about various safety concerns such as ... (30 contamination of product containers and a threat to public health and safety

...

8. On December 16, 2007, [the Complainant] sent Becky Henry (Henry) the Quality Assurance/Quality Control manager and email complaint about safety concerns related to ... debris and contamination associated with the overhead conveyor system ...
10. On December 19, 2007, [the Complainant] sent Melville and email complaint about safety concerns related to the use of a chemical called Sani-Glide and its harmful affects to humans; and concerns about the disposal of the chemical to the environment ...
11. On December 20, 2007, [the Complainant] sent Henry an email complaining about safety concerns related to the use of a chemical called Sani-Glide and complaining about the retaliatory conduct of ... a manager for the milk filling room ... Also on this day Melville retaliated against [him] by ... warning him not to distribute complaints about how managers treated him ...
14. On January 17, 2008, Melville prepared a written warning letter for [the Complainant] falsely accusing [him] of dishonesty related to a claim of insufficient payment of wages ... and warned him against future mispunches ...
21. On April 11, 2008, [the Complainant] sent an email to Joe Vitale about safety concerns related to the use of wooden pallets in the processing areas of the plant ...
24. On May 1, 2008, [the Complainant] sent Vitale a letter complaining that Vitale was harassing and discriminating against him for raising safety complaints and that Vitale was retaliating against him by falsely accusing him of mispunching the time clock ...
36. On August 24, 2008, [the Complainant] sent an email to Mike Melville about HACPP safety concerns ...
39. On September 29, 2008, [the Complainant] sent an email to Tom Schell about a potential product contamination concern due to the air flow from the empty case room into the milk filling room which could result in product contamination during milk filling activities through airborne contamination ...
75. On September 9, 2009, [the Complainant] sent John Zebendon an email complaining about a hostile work environment that somebody had smashed his work cart. ...
77. On September 14, 2009, [the Complainant] filed three whistleblower complaints against [the Respondents under CPSIA, SOX and OSHA] ...
78. On September 30, 2009, [the Complainant] filed a supplemental whistleblower complaint against [the Respondents] under the employee protection provision of [CSPIA] ...
79. On October 2, 2009, [the Complainant] filed a supplemental whistleblower complaint against [the Respondents] under [SOX] ...
81. On October 8, 2009, [the Complainant] filed a supplemental complaint against [the Respondents] inclusive of [SOX, OSHA and CPSIA] ...
82. On October 14, 2009, [the Complainant] filed a Second Supplemental Complaint of Retaliation and Hostile Work Environment Against [the Respondents] ...
83. On October 30, 2009, [the Complainant] filed a Third Supplemental Complaint of Retaliation and Hostile Work Environment Against [the Respondents] ...
84. On November 3, 2009, [the Complainant] filed a Third Supplemental Complaint of Retaliation and Hostile Work Environment Against [the Respondents] ...”

c. February 24, 2010 Complainant’s Response to Show Cause –

In his February 24, 2010 response to a Show Cause Order, the Complainant stated:

“On December 8, 2007, Complainant complained to supervisors about (1) the cleaning of the empty case conveyor system at the plant; (2) contact contamination of food-containers (plastic bottles) from chemicals like Ecolab Sani-Glide used at the manufacturing facility; and (3) that contaminated plastic bottles could reach and injure consumers who purchased the products at Publix’s retail stores.

On December 16, 2007, Complainant complained to superiors about (1) the contact surface contamination of food containers (plastic bottles) stemming from the overhead empty case conveyor systems that could injure consumers; (2) the failure of associates and managers to comply with plant standards related to the use of hair nets; (3) the complacent culture at the Dairy Plant; (4) failure of associates to use footbaths; and (5) contaminated wood pallets taken into the processing areas of the plant.

Complainant reasonably believed that these manufacturing practices at the Dairy Plant could contaminate the contact surface of food containers (plastic bottles) manufactured, labeled and distributed to consumers for purchase at Publix's retail stores.

On December 20, 2007, Complainant complained to superiors about a concern related to the use of Ecolab Sani-Glide, a chemical which is extremely corrosive and toxic to humans and to the environment. Complainant reasonably believed that the chemical could contaminate the surface of food containers (plastic bottles) manufactured, labeled and distributed to consumers for purchase at Publix retail stores.

Complainant avers here that he also raised concerns to superiors about other chemicals used at the Dairy Plant and in particular Ecolab-Dygest which was applied around the facility to sanitize floors and equipment. Complainant reasonably believed that the chemical Dygest could contaminate the contact surface of food containers (plastic bottles) manufactured, labeled and distributed to consumers for purchase at Publix retail stores. In addition, Complainant reasonably believed that the chemical Dygest could harm himself and his coworkers at the facility through contact and inhalation.

On August 24, 2008, Complainant complained to superiors about concerns related to compliance standards known as Hazard Analysis and Critical Control Points (HACPP) in the wiping of tools ... Complainant reasonably believed that the failure of Respondents to enforce compliance with established manufacturing standards could contaminate the contact surface of food containers (plastic bottles) manufactured, labeled and distributed to consumers for purchase at Publix retail stores.

On September 29, 2008, Complainant complained to superiors about a concern related to the pressurization of the milk filling room. Complainant reasonably believed that the failure of the Respondents to maintain a positive air pressure volume in the milk filling room could contaminate the contact surface of food containers (plastic bottles) manufactured, labeled and distributed to consumers for purchase at Publix retail stores.”

The Complainant also submitted a February 23, 2010 Affidavit in which he averred to his employment history with Publix Super Markets, Inc. and the following relevant statements:

“2. I was employed at Publix Super Markets, Inc. (Publix) Dairy Plant located in Deerfield Beach, Florida from July 24, 2007 until November 3, 2009 when I was discharged by Michael Melville the plant manager. ...

5. ... Publix manufactures, packages, labels, and distributes food products in plastic bottles which are combined as consumer products and sold at Publix's retail stores. ...

7. ... I can attest that on December 8, 2008¹³, I complained to my superiors about concerns related to contamination of the outside contact surface of plastic bottles in which food products were packaged, labeled, distributed, and sold to consumers at Publix retail stores. It was my belief that the outside contact surface of the plastic bottles and the containers used to carry the plastic bottles, but not the food product inside the plastic bottles, was being contaminated with a hazardous and toxic chemical called Ecolab Sani-Glide and by the waste in the conveyor system which was disbursed during production operations by an employee using a high-pressure water spray. It was also my belief that consumers who purchased Publix food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of harmful chemicals through physical contact with the outside contact surface of contaminated plastic bottles.

8. ... I can attest that on December 16, 2007, I complained to my superiors about concerns related to contamination of the outside contact surface of plastic bottles in which food products were packaged, labeled, distributed, and sold to consumers at Publix retail stores. It was my belief that the outside contact surface of the plastic bottles and the

¹³ Listed as December 8, 2008 but identified in supporting attachments as December 8, 2007.

containers used to carry the plastic bottles, but not the food product inside the plastic bottles, was contaminated by various means stemming from the conveyor systems; failure of employees and managers to comply with plant standards related to the use of hairnets; the complacent culture at the Dairy Plant; the failure to maintain and use footbaths; and the use of wooden pallets believed to be contaminated by mice and rats and taken into (clean) processing areas of the plant. It was also my belief that consumers who purchased food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of hazardous and toxic chemicals and other contaminants through physical contact with the outside surface of the contaminated plastic bottles but not by food product contained inside the plastic bottles.

9. ... I can attest that on December 20, 2007, I complained to my superiors about concerns related to contamination of the outside contact surface of plastic bottles in which food products were packaged, labeled, distributed, and sold to consumers at Publix retail stores. It was my belief that plastic bottles, but not the food product inside the plastic bottles, were being contaminated through the use of a hazardous and toxic chemical called Ecolab Sani-Glide which is known to be extremely corrosive and toxic to humans and to the environment. It was also my belief that consumers who purchased food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of hazardous and toxic chemicals through physical contact with the outside contact surface of the contaminated plastic bottles.

10. ... I can attest that during the context of my employment at the Dairy Plant, I raised concerns about the use of a chemical I believed was called Ecolab Dygest which was applied around the facility to sanitize floors and equipment. It was my belief that the outside contact surface of plastic bottles, but not the food product inside, were being contaminated by use of Ecolab Dygest. It was also my belief that consumers who purchased Publix food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of these chemicals through physical contact with the outside surface of the contaminated plastic bottles.

11. ... I can attest that on August 24, 2008, I complained to my superiors about concerns related to compliance standards known as Hazard Analysis and Critical Control Points (HACCP) as applied to wiping tools ... [running water in washrooms, absence of sanitation agents, paper towels, and training]. It was my belief that the failure of Publix to enforce compliance with established manufacturing standards could result in contamination of the outside contact surface of plastic bottles, but not the food-product inside the plastic bottles. It was also my belief that consumers who purchased Publix food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of contaminants through physical contact with the outside surface of the contaminated plastic bottles.

12. ... I can attest that on September 29, 2008, I complained to my superiors about concerns related to the pressurization of the milk filling room; and that failure to maintain a positive air pressure volume could contaminate food-products as well as the outside contact surface of plastic bottles in which food products were packaged. It was also my belief that consumers who purchased Publix food-products packaged in contaminated plastic bottles could be harmed and injured by absorption of contaminants through physical contact with the outside surface of the contaminated plastic bottles.”

He also attached technical summaries and emails in support of his February 24, 2010 statements and February 23, 2010 affidavit.

DISCUSSION

I. The complaints of alleged discrimination and/or adverse employment actions taken on or before Saturday, March 28, 2009 are time barred by §2087(b)(1) of CPSIA and must be denied.

CPSIA requires that an individual “who believes that he or she has been discharged or otherwise discriminated against by any person in violation of [CPSIA] may, not later than 180 days after the date on which such violations occurs, file ... a complaint with the Secretary of Labor.” 15 U.S.C. §2087(b)(1)

In this case, the Complainant first filed a complaint for a CPSIA violation on September 14, 2009. He amended the complaint on September 30, 2009 to add statements concerning personal belief of product liability. The 180-day period ending on September 14, 2009 encompasses the period from Sunday, March 29, 2009 through Monday, September 14, 2009. Thus any alleged adverse / discriminatory actions alleged to have occurred on or before Saturday, March 28, 2009, are statutorily barred from action under CPSIA and must be denied.

Of the acts of retaliation alleged by the Complainant under CPSIA to have occurred, the following are identified as having occurred on or before March 28, 2009,:

1. On December 20, 2007, [the Complainant] sent Henry an email complaining about safety concerns related to the use of a chemical called Sani-Glide and complaining about the retaliatory conduct of ... a manager for the milk filling room ... Also on this day Melville retaliated against [him] by ... warning him not to distribute complaints about how managers treated him ...
2. On January 17, 2008, Melville prepared a written warning letter for [the Complainant] falsely accusing [him] of dishonesty related to a claim of insufficient payment of wages ... and warned him against future mispunches ...
3. On May 1, 2008, [the Complainant] sent Vitale a letter complaining that Vitale was harassing and discriminating against him for raising safety complaints and that Vitale was retaliating against him by falsely accusing him of mispunching the time clock ...¹⁴
4. Harassment involving “falsely accusing him of mis-punches on the time clock” on or prior to May 1, 2008.
5. A disciplinary report written on May 19, 2008.
6. A May 18, 2008 warning from a forklift operator.
7. A disciplinary meeting with Vitale and Rinehart with accusations of poor performance, around August prior to Schell’s hire at Publix (2008)¹⁵.

In view of the time limit provisions under 15 U.S.C. §2087(b)(1), the Complainant’s claims for redress of the above seven alleged violations of CPSIA must be denied.

II. Those complaints of alleged discrimination and/or adverse employment actions alleged to have occurred on or before Wednesday, June 3, 2009 and were first raised in the complaint filed November 30, 2009 are time barred by §2087(b)(1) of CPSIA.

In his complaint filed on November 30, 2009, the Complainant listed for the first time the following alleged acts of discrimination and retaliation:

1. On December 20, 2007, [the Complainant] sent Henry an email complaining about safety concerns related to the use of a chemical called Sani-Glide and complaining about the retaliatory conduct of ... a manager for the milk filling room ... Also on this day Melville retaliated against [him] by ... warning him not to distribute complaints about how managers treated him ...
2. On January 17, 2008, Melville prepared a written warning letter for [the Complainant] falsely accusing [him] of dishonesty related to a claim of insufficient payment of wages ... and warned him against future mispunches ...

The 180-day period ending on November 30, 2009 encompasses the period from Thursday, June 4, 2009 through Monday, November 30, 2009, 2009. Thus the two identified adverse /

¹⁴ Also listed in the November 30, 2009 complaint.

¹⁵ In Attachment 3 T. Schell states he signed the Complainant’s December 2008 performance evaluation after discussions with J. Vitale because he had not been the Complainant’s supervisor for the entire July to December 2008 mid-annual review period. Accordingly, the event must have taken place in August 2008.

discriminatory actions alleged to have occurred on or before Wednesday, June 3, 2009, and first raised in the November 30, 2009 complaint are statutorily barred from action under CPSIA. Accordingly, the Complainant's claims for redress of these two alleged violations of CPSIA must be denied.

III. The evidence of record failed to demonstrate a question of a material fact as to the existence of discrimination and/or adverse employment actions by the Respondent through November 2, 2009 that was not time barred by §2087(b)(1) of CPSIA such that the Respondent is entitled to summary decision denying the complaints of retaliations and/or discrimination prior to November 3, 2009.

The Complainant's employment with Respondent was terminated on November 3, 2009. The Complainant does not allege adverse or discriminatory actions under CPSIA after November 3, 2009.

The Complainant alleges "hostile workplace" in broad terms through his complaint headings. The Complainant has failed to provide evidence that supports this broad allegation which the Respondent denies having occurred. Accordingly, the Complainant's claims for redress under CPSIA based upon the overly broad allegation of hostile work environment within 180 days of filing his respective complaints must be denied.

The Complainant has alleged the remaining following acts of discrimination and/or adverse employment action as having occurred prior to November 3, 2009:

1. False accusation on August 25, 2009 involving not responding to calls in the ice room and threat of a disciplinary report.
2. Receiving "disciplinary coaching about the ice room incident" on September 8, 2009.
3. "Entire work cart was smashed and left in disarray" on or about September 9, 2009.¹⁶
4. Harassment on or about October 4, 2009, by "falsely accusing [the Complainant] of having 'overdue pms' ... [and assigning excessive work where] there is little chance [the Complainant] would ever be able to complete the assigned work orders."
5. False accusation on October 7, 2009, "of mis-punching the time clock for the dates of September 2nd 2009 and September 4th 2009..."
6. On or about October 13, 2009, a supervisor Schell prepared a "time away from work" document "that incorrectly documented [the Complainant's] absence from work for two-days beginning October 5th and ending October 6th 2009, for the reason of 'Back Pain' ... without [the Complainant's] prior knowledge, consent or approval ... [as an attempt] to set-up [the Complainant] for discipline and termination for alleged sick-leave abuse or TAFW unauthorized use."

a. *The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged "false accusation on August 25, 2009 involving not responding to calls in the ice room and threat of a disciplinary report" was an adverse or discriminatory action by the Respondent under CPSIA.*

¹⁶ Also listed in the November 30, 2009 complaint as "On September 9, 2009, [the Complainant] sent John Zebendon an email complaining about a hostile work environment that somebody had smashed his work cart. ..."

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent's Motion for a Summary Decision. The issue of false accusations on August 25, 2009 for "not responding to calls in the ice room" is addressed in the statement of J. Zebendon (Attachment 2).

The record demonstrates that the Complainant had complained about J. Vitale retaliating against him by giving disciplinary coaching for failure to respond to calls for maintenance in the ice room on August 23, 2009; that employees in the ice room had called for maintenance support approximately 8 times during the Complainant's third shift on August 23, 2009; that an ice room employee had personally asked the Complainant for maintenance assistance in the ice room but was ignored by the Complainant on August 23, 2009; that the Complainant was aware of the requests for maintenance assistance in the ice room on August 23, 2009; that the ice room was inoperable for approximately two hours during the period of non-response for maintenance support; and that the Complainant received a final written warning on September 9, 2009, for failure to respond to maintenance requests from the ice room on August 23, 2009, in a prompt manner. The record also demonstrates that the Complainant had received oral counseling on July 16, 2009 for similar failure to respond to maintenance requests on July 1, 2009 and that Publix has a progressive disciplinary policy where final written warning is a progression from oral warning that is used when an employee fails to rectify the a performance situation or a violation of company policy that was addressed in the oral counseling. There is no evidence that creates an inference that the events violated CPSIA.

After deliberation on the record, this Administrative Law Judge finds that the evidence fails to demonstrate a question of material fact of whether the disciplinary action taken because of the Complainant's failure to respond to maintenance calls from the ice room on August 23, 2009 was an adverse or discriminatory action by the Respondent under CPSIA and that the Respondent is entitled to a favorable judgment on this issue.

b. The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged receiving "disciplinary coaching about the ice room incident" on September 8, 2009, was an adverse or discriminatory action by the Respondent under CPSIA.

For reasons set forth in subparagraph III.a above, the evidence of record fails to demonstrate a question of material fact of whether the disciplinary action taken in September 2009, because of the Complainant's failure to respond to maintenance calls from the ice room, was an adverse or discriminatory action by the Respondent under CPSIA. Accordingly, the Respondent is entitled to a favorable judgment on this issue.

c. The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged a hostile work environment because his "entire work cart was smashed and left in disarray" on or about September 9, 2009, was an adverse or discriminatory action by the Respondent under CPSIA.

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent's Motion for a Summary Decision.

The events surrounding the Complainant's tool cart being "smashed and left in disarray" are addressed in the statement of D. Hustey (Attachment 1).

The record demonstrates that the Complainant reported to D. Hustey on September 9, 2009 that his tool cart was smashed and overturned; that the Complainant accompanied D. Hustey to the area in which the tool cart was located; that D. Hustey took pictures of the tool cart, nearby forklifts, displaced forklift stop and the work area; that the Complainant and D. Hustey agreed that an unsecured forklift probably struck the tool cart and caused it to turn over; that D. Hustey recommended the forklift stop be bolted to the floor; and that the Complainant bolted the forklift stop to the floor. There is no evidence that creates an inference that the events violated CPSIA.

After deliberation on the record, this Administrative Law Judge finds that the evidence of record fails to demonstrate a question of material fact that the damage done to the Complainant's tool cart on September 9, 2009 was an adverse or discriminatory action by the Respondent under CPSIA and that the Respondent is entitled to a favorable judgment on this issue.

d. The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged harassment on or about October 4, 2009, by "falsely accusing [the Complainant] of having 'overdue pms' ... [and assigning excessive work where] there is little chance [the Complainant] would ever be able to complete the assigned work orders" was an adverse or discriminatory action by the Respondent under CPSIA.

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent's Motion for a Summary Decision. The events surrounding the identification and assignment of overdue maintenance assignments, including the October 4, 2009 assignment to the Complainant, are addressed in the statements of T. Schell (Attachment 3) and J. Vitale (Attachment 5).

The record demonstrates that Publix uses a computerized maintenance work order system to track the need and performance of preventive maintenance at the facility; the Parts Department initiates a computerized report of all preventive maintenance orders that have not been completed by the order completion date; the computer generated past due preventive maintenance report is delivered to the shift supervisor of the maintenance department; J. Vitale was the Complainant's third shift Class "A" maintenance technician supervisor; the maintenance supervisors distribute the past due preventive maintenance report to the Class "A" maintenance technician responsible for completion of the task by placing a copy of the report in their respective mailbox for completion. The record of evidence fails to create even an inference that the overdue preventive maintenance assignments given the Complainant at any time during his employment were anything other than routine, computer generated lists of preventive maintenance assignments that had not been completed as scheduled.

After deliberation on the record, this Administrative Law Judge finds that the evidence of record fails to demonstrate a question of material fact that the Complainant was harassed due to overdue preventive maintenance assignments on or about October 4, 2009 as an adverse or discriminatory action by the Respondent under CPSIA and that the Respondent is entitled to a favorable judgment on this issue.

- e. *The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged false accusation on October 7, 2009, “of mis-punching the time clock for the dates of September 2nd 2009 and September 4th 2009” was an adverse or discriminatory action by the Respondent’s agents under CPSIA.*

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent’s Motion for a Summary Decision. The events surrounding “mis-punches” are addressed in the statement of T. Schell (Attachment 5).

The record demonstrates that Publix uses a Kronos computer system to track the time and attendance of employees; each employee enters their work attendance by “punching” a time clock; the Kronos computer system produces an initial payroll report for the plant manager to review and correction; T. Schell was the plant manager responsible for the review of the payroll report involving the Complainant’s work attendance on September 2, 2009 and September 4, 2009; T. Schell noted report discrepancies for three employees in the related payroll report, including the Complainant; T. Schell corrected the “mis-punches” for the three employees; a revised payroll report was generated by the Kronos computer system; the Complainant and two other impacted employees were advised by the computer system report that the mis-punches had been corrected; and J. Vitale was not involved in the review or correction of the Kronos computer generated payroll reports. There is no evidence that creates an inference that the events violated CPSIA.

After deliberation on the record, this Administrative Law Judge finds that the evidence of record fails to demonstrate a question of material fact of whether the Complainant was falsely accused of mis-punching the time clock on October 7, 2009 was an adverse or discriminatory action by the Respondent under CPSIA and that the Respondent is entitled to a favorable judgment on this issue.

- f. *The documents submitted for consideration fail to establish, when considered in the best light for the Complainant, that the alleged October 13, 2009, “time away from work” document prepared by supervisor Schell “that incorrectly documented [the Complainant’s] absence from work for two-days beginning October 5th and ending October 6th 2009, for the reason of ‘Back Pain’ ... without [the Complainant’s] prior knowledge, consent or approval ... [as an attempt] to set-up [the Complainant] for discipline and termination for alleged sick-leave abuse or TAFW unauthorized use” was an adverse or discriminatory action by the Respondent’s agents under CPSIA.*

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent’s Motion for a Summary Decision. The events surrounding the submission of the TAFW form for October 5 and 6, 2009 is addressed in the statement of T. Schell (Attachment 3).

The record demonstrates that all Publix employees are required to account for time away from work each Monday as part of completing payroll requirements; the Complainant was away from

work on October 5 and 6, 2009; the plant manager was notified that the Complainant was away from work on October 5 and 6, 2009 and only worked 24 hours of the applicable work-week; the plant manager was aware that the Complainant was out of work on October 5, 2009 due to back pain; neither the Complainant nor his immediate supervisor were available on October 6, 2009 to explain to the plant manager the reason for the Complainant's absence on October 6, 2009; the plant manager assumed that the Complainant was absent on October 6, 2009 for the same reason he was absent on October 5, 2009; the plant manager submitted a TAFW form to the payroll department indicating that the Complainant was away from work on those two days for the same reason of back pain. The record demonstrates that upon return to work the Complainant notified the plant manager that his October 6, 2009 time away from work was an approved absence from his immediate supervisor; the plant manager confirmed the immediate supervisor J. Vitale had approved the time away from work; the plant manager timely notified the payroll department that October 6, 2009 was an excused absence; the plant manager timely notified the Complainant that the TAFW form for October 6, 2009 for back pain had been changed to an excused absence; the plant manager timely apologized to the Complainant for the event. There is no evidence that creates an inference that the events violated CPSIA.

After deliberation on the record, this Administrative Law Judge finds that the evidence of record fails to demonstrate a question of material fact of whether supervisor T. Schell attempted to set the Complainant up for discipline or termination through a false TAFW document was an adverse or discriminatory action by the Respondent under CPSIA and that the Respondent is entitled to a favorable judgment on this issue.

IV. The Respondents have demonstrated by clear and convincing evidence that the Complainant's termination of employment on November 3, 2009 was unrelated to the Complainant's alleged activity protected by §2087(a) of the CPSIA.

The Complainant alleged that his employment termination on November 3, 2009, was in retaliation for his protected activity under CPSIA.¹⁷ The documents submitted for consideration establish that the Complainant's employment was terminated on November 3, 2009 and that he had engaged in protected activity under CPSIA prior and close in time to the November 3, 2009 adverse employment action by filing complaints under CPSIA in September and October 2009. When viewed in a light most favorable to the Complainant, his November 3, 2009 is a prima facie case of a violation under §2087(a) of the CPSIA. However, even if a prima facie case has been established, no relief under CPSIA may be granted is the employer establishes by clear and convincing evidence that the November 3, 2009 employment termination would have occurred notwithstanding protected activity by the employee. 15 U.S.C. §2087(a)(2)(B)(iv)

¹⁷ "On November 3, 2009, at about 5:30 a.m. without prior warning or notice, Complainant was summoned to Melville's office where Melville and John Zebendon, a human resources representative were waiting. A very short meeting ensued where Melville questioned Complainant about hot work permit form related to a job Complainant had apparently been involved with on or about October 26, 2009, some nine days prior. Complainant was then asked to return to his work area which he did. Shortly thereafter, Complainant was again summoned to Melville's office and accused of lying about certain questions presented earlier. Melville then fired Complainant and had Kevin Jenkins (Jenkins) escort Complainant out of the plant and collect Complainant's badge and parking permit."

Through the date of this Decision and Order, the Complainant has failed to submit additional information for consideration in response to the Respondent's Motion for a Summary Decision. The events surrounding the termination of Complainant's employment on November 3, 2009 are addressed in the statements of D. Hustey (Attachment 1, 7); J. Zebendon (attachments 2, 8, 11); M. Melville (Attachments 9, 10); and J. Vitale (Attachments 5, 6).

The record demonstrates that Publix has a hot work policy requiring that all work involving spark producing, welding, flame work must be permitted and performed with specific pre-work precautions, work precautions, and post-work fire watch precautions; the Complainant was aware of the company hot work policy and requirements; on October 26, 2009 the Complainant performed spark producing grinding on chain link in an undesignated work area adjacent to the office of J. Vitale; the Complainant failed to perform pre-work precautions of removing flammable oils and materials from the area prior to performing the hot work; the Complainant failed to provide or maintain a required 30-minute fire watch after stopping the hot work; the Complainant failed to submit a completed hot work permit at the close of his October 26, 2009 shift; the Complainant made false statements to his supervisors concerning the completion of pre-hot work requirements involving the removal of oil and flammable material prior to commencing the hot work; the Complainant made false statements to his superiors concerning the maintenance of a 30-minute fire watch after stopping the hot work; and the Complainant made false statements on the hot work permit he submitted as related to the time and manner of performance of the hot work involved.

The record demonstrates that Publix has a progressive disciplinary process for less serious employee performance deficiencies and violations of company policy; violations of the Publix hot work policy is a serious violation for which the progressive disciplinary process need not apply; making false statements or intentionally misleading statement to Publix supervisors in the course of an investigation into employee work performance or actions is a serious offense for which termination of employment is appropriate; as an employee of Publix the Complainant was aware of the potential results of making false and/or misleading statements to supervisors prior to the events of November 3, 2009; the Complainant was reminded of the potential results of making false and/or misleading statements to supervisors immediately prior to his making a statement to supervisors on November 3, 2009; and the Complainant made materially false and misleading statement to his supervisors the morning of November 3, 2009 as related to his actions arising out of his hot work of grinding chain on October 26, 2009.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Respondent has established by clear and convincing evidence that the termination of the Complainant's employment on November 3, 2009 was unrelated to the Complainant's alleged activity protected by §2087(a) of the CPSIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the documents submitted for consideration and the administrative filings, this Administrative Law Judge finds –

1. The complaints of alleged discrimination and/or adverse employment actions taken on or before Saturday, March 28, 2009 are time barred by §2087(b)(1) of CPSIA.
2. Those two complaints of alleged discrimination and/or adverse employment actions alleged to have occurred on or before Wednesday, June 3, 2009 and were first raised in the complaint filed November 30, 2009 are time barred by §2087(b)(1) of CPSIA.
3. The Complainant has failed to demonstrate a question of a material fact as to the existence of discrimination and/or adverse employment actions by the Respondent through November 2, 2009 that was not time barred by §2087(b)(1) of CPSIA.
4. The Complainant's termination of employment on November 3, 2009 was an adverse employment action.
5. The Respondents have demonstrated by clear and convincing evidence that the Complainant's termination of employment on November 3, 2009 was unrelated to the Complainant's alleged activity protected by §2087(a) of the CPSIA.
6. The Complainant is not entitled to relief under CPSIA on the complaints filed September 14, 2009 and amended September 30, 2009, October 8, 2009, October 14, 2009, October 30, 2009, November 3, 2009, and November 30, 2009.
7. The Respondent is entitled to a favorable judgment as a matter of law.

ORDER

In view of all the foregoing, it is hereby Ordered that **the complaints filed by the Complainant, on September 14, 2009 and amended September 30, 2009, October 8, 2009, October 14, 2009, October 30, 2009, November 3, 2009, and November 30, 2009 under 15 U.S.C. §2087(a), are DENIED.**

ALAN L. BERGSTROM
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1983.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1983.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1983.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1983.109(e) and 1983.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1983.110(b).