



Issue Date: 05 March 2010

Case No.: 2010-CPS-00001

In the Matter of:

THOMAS SAPORITO,

Complainant,

v.

PUBLIX SUPER MARKETS, INC., et al.,

Respondents.

**RECOMMENDED DETERMINATION AND ORDER
RETAINING JURISDICTION FOR ACTION UNDER 15 U.S.C. §2087(b)(3)(C)
AND
DISMISSING COMPLAINT**

The above matter is a complaint of employment discrimination under Section 2087 of the Consumer Product Safety Improvement Act of 2008 (Act). The case has been referred to the Office of Administrative Law Judges for formal hearing on 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).

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, indicates 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. The Complainant entered employment on July 24, 2007 and ended employment on November 3, 2008. The Complainant alleges that he suffered from a hostile work environment and his employment was terminated in retaliation for complaints to supervisors involving contamination of milk products and contamination of a food processing area.¹ The complaint was filed on September 14, 2008.

¹ 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 appeal and this determination.

On January 5, 2010, the Complainant filed “his objection to the findings of OSHA as described above and respectfully requests a formal hearing on the record before an administrative law judge.” In his three paragraph filing the Complainant stated the issue appealed as “On December 10, 2009, Darlene Fossum, Area Director for the Occupational Safety and Health Administration (OSHA) issued ‘Secretary’s Findings’ ... in which she concluded, in relevant part, that ‘... A preponderance of the evidence indicates that Complainant’s food safety complaints are not covered by CPSIA and cannot be pursued by OSHA.’”

On January 14, 2010, this Administrative Law Judge issued an “Order to Show Cause Why Complaint Should Not Be Dismissed and Advice and Order to ‘Pro Se’ Parties” which was received by the Complainant. On February 3, 2010, the Complainant filed a motion for enlargement of time to file his response. The time to file a response was enlarged to March 1, 2010. On February 25, 2010, the Complainant filed his response with the Court. The Complainant is pro se; but, as noted in footnote 2, the Complainant is an experienced litigator in complaints under the various federal “whistleblower” statues and has taken several cases to the Administrative Review Board and one case through the U.S. Court of Appeals for the 11th Circuit to the U.S. Supreme Court, all without legal representation.²

In his response, the Complainant avers that he was employed by Publix Super Markets, Inc. (Publix) Dairy Plant located in Deerfield, Florida, from July 24, 2007 until November 3, 2009, as a Class “A” maintenance technician. He avers that on December 16, 2007; December 20, 2007;

² *T. Saporito v. U.S. Nuclear Regulatory Commission*, ALJ No. 2009-ERA-00016 now pending before the Office of Administrative Law Judges; *T. Saporito, et. al. v. Lewis Hay III and Florida Power & Light Co.*, ALJ No. 2009-ERA-00012 (Sept. 8, 2009); *T. Saporito v. Exelon Corp, et. al.*, ALJ No. 2009-ERA-00010 (Jan. 19, 2010); *T. Saporito, et. al. v. Florida Power & Light Co.*, ALJ No. 2009-ERA-00009 (July 30, 2009); *T. Saporito, et. al. v. Florida Power & Light Co., et. al.*, ALJ No. 2009-ERA-00006 (July 30, 2009); *T. Saporito v. Florida Power & Light Co.*, ALJ No. 2009-ERA-00001 (Mar. 5, 2009); *T. Saporito v. Florida Power & Light Co.*, ALJ No. 2008-ERA-00014 (Oct. 2, 2008); *T. Saporito v. Florida Power & Light Co.*, ALJ No. 2006-ERA-00008 (Mar. 24, 2006); *T. Saporito v. FedEx Kinko’s Office and Print Services, Inc.*, ALJ No. 2005-CAA-00018 (Jan. 6, 2006), ARB No. 06-043 (Mar. 31, 2008); *T. Saporito v. Asphlundh, d/b/a Central Locating Service*, ALJ No. 2005-CAA-00013 (Mar. 15, 2006), ARB No. 05-004 (Feb. 28, 2006); *T. Saporito v. GE Medical Systems and ADECCO Technical*, ALJ No. 2005-CAA-00007 (May 20, 2005); *T. Saporito v. Central Locating Service, Ltd. and Asphlundh Tree Expert Co.*, ALJ No. 2004-CCA-00013 (Oct. 6, 2004); *T. Saporito v. Quarles & Brady Streich Lang, et. al.*, ALJ No. 2004-CAA-00009 (Mar. 15, 2004); *T. Saporito v. BellSouth Corp., et. al.*, ALJ No. 2004-CAA-00008 (Mar. 15, 2004); *T. Saporito v. U.S. Dept of Labor*, ALJ No. 2003-CAA-00009 (Feb. 12, 2003), ARB No. 03-063 (Mar. 31, 2004); *T. Saporito v. GE Medical Systems, et. al.*, ALJ Nos. 2003-CAA-00001 / 2003-CAA-00002 (Oct. 15, 2004), ARB No. 04-007 (Nov. 25, 2003) and ARB No. 05-009 (May 24, 2005); *T. Saporito v. Florida Power & Light Co., et. al.*, ALJ No. 1994-ERA-00035 (Apr. 5, 1995), ARB No. 94-ERA-35 (Jul 19, 1996); *T. Saporito v. Arizona Public Service Co., et. al.* ALJ No. 1993-ERA-00045 (Feb. 8, 1994), ALJ Nos. 94-ERA-29 / 93-ERA-45 / 93-ERA-26 (Nov. 15, 1994), Sec’y Labor No. 94-ERA-29 / 93-ERA-45 / 93-ERA-26 / 92-ERA-30 (June 19, 1995); *T. Saporito v. Nuclear Support Services, Inc. et. al.*, ALJ No. 1993-ERA-00028 / 1992-ERA-00038 / 1992-ERA-00045 (Apr. 25, 1997), ARB No. 97-093 (May 13, 1997); *T. Saporito v. Florida Power & Light Co.*, ALJ No. 1993-ERA-00023 (Nov. 12, 1993), Sec’y Labor No. 93-ERA-0023 (Sep. 7, 1995); *T. Saporito v. Florida Power & Light Co., et. al.*, ALJ Nos. 1990-ERA-27 / 1990-ERA-0047 (Nov. 6, 1990), Sec’y Labor Nos. 90-ERA-0027 / 90-ERA-0047; *T. Saporito v. Florida Power & Light Co.*, ALJ Nos. 1989-ERA-00007 / 1989-ERA-00017 (Oct. 15, 1997), ARB No. 98-008 / 89-ERA-7 / 89-ERA-17 (Aug. 11, 1998), *aff’d*, 192 F.3d 130 (11th Cir. 1999) (unpublished table decision), *reh’g en banc denied*, 210 F.3d 395 (11th Cir. 2000), *dismissed* ARB No. 04-079 (Dec. 17, 2004), *cert. denied* 126 S. Ct. 1172, 546 US 1150 (2006) (T. Saporito petition to U.S. Supreme Court at 2005 WL 3295170)

and December 8, 2008, he complained to supervisors “about concerns related to the 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.” He states that it was his belief that “the outside contact surface of the plastic bottles, and containers used to carry plastic bottles, but not the food product inside the plastic bottles, were contaminated” with harmful chemicals by various means. He avers that on August 24, 2008, he raised concerns about wiping tools, lack of running hot-water to wash hands, absence of hand sanitation agents and lack of training “could result in contamination of the outside contact surface of plastic bottles, but not the food product inside the plastic bottles.” He avers that on September 29, 2008, he complained to superior about pressurization of the milk filling room because “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.” He adds that he was concerned “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 contact surface of contaminated plastic bottles.”

In his original page complaint dated September 14, 2009, the Complainant alleged episodes of protected activity and development of a hostile work environment under the Occupational Safety and Health Act of 1979, §11(c). Such allegations are specifically excluded from consideration under the Consumer Product Safety Act³ (CPS Act) and are not matters appealed to this Administrative Law Judge. In a “Complainant’s Supplemental Complaint of Retaliation Against Respondents” dated September 30, 2009, the Complainant alleged he engaged in protected activity under the Act–

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 14, 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.”

³ See 15 USC §2080(a)

In a “Complainant’s Supplemental Complaint of Retaliation and Hostile Work Environment Against Publix Super Markets, Et Al” dated October 8, 2009, the Complainant stated he had previously filed a complaint under the Sarbanes-Oxley Act of 2002 identified as OSHA Case No. 4-1050-09-077; had filed a complaint under the Occupational Safety and Health Act identified as OSHA Case No. 4-1050-09-078; and had filed a complaint under the Consumer Product Safety Act of 2008 identified as OSHA Case No. 4-1050-90-076. In this October 8, 2009 document, the Complainant alleged additional adverse employment actions being taken as a result of his earlier complaints. No new allegations of protected activity were set forth.

In a “Complainant’s Fourth Supplemental Complaint of Retaliation and Hostile Work Environment Against Publix Super Markets, Et Al” the Complainant added his November 3, 2009 employment termination to the list of alleged adverse employment actions being taken as a result of his earlier complaints. No new allegations of protected activity were set forth.

In a “Complainant’s Fifth Supplemental Complaint of Retaliation and Hostile Work Environment Against Publix Super Markets, Et Al” the Complainant set forth his duties as a Maintenance Technician Class “A” as well as his hourly rate of pay. No new allegations of protected activity under the Consumer Product Safety Act were set forth.

ISSUE

The issue in this case is whether the Complainant’s specific working condition/practice statements to supervisors involving “concerns related to the 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” and “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” are protected activity under the Act.

POSITION OF THE PARTIES

Position of Complainant:

Complainant argues that because the plastic containers which hold food products were manufactured by Publix and used in the delivery of food products to the ultimate consumers of the food product, his statements to supervisors were protected activity under the Act.

Position of Respondent:

Respondent continues to argue that the basis of the complaints are within the prevue of the Food and Drug Administration (FDA) and are not subject to the Consumer Products Safety Improvement Act or to other Acts which are enforced by the Consumer Products Safety Commission (CPSC).

DISCUSSION

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 Act 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 chapter⁴ or any other Act enforced by the Commission⁵, 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.”

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

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**

⁴ U.S. Code, Title 15, Chapter 47 (Consumer Product Safety chapter of the Commerce and Trade title)

⁵ Consumer Product Safety Commission, 15 USC §2053

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 Consumer Product Safety Commission (CPSC) has no authority under the CPS Act 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)

Under the Federal Food, Drug and Cosmetics Act, “the term ‘food’ means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.” 21 USC §321(f)

A dispute between the Consumer Product Safety Commission (CPSC) and the U.S. Food and Drug Administration (FDA) as to jurisdiction with respect to food, food containers, and food-related articles and equipment culminated with the Commissioners⁶ entering Memoranda of Understanding MOU 225-76-2003 on July 26, 1976⁷. The need for the MOU “arose because of uncertainty concerning the scope of the statutory exclusion under [CPS Act] for all articles defined as ‘food’ by the FDC Act. The need for clarification is acute because determination of whether a potentially hazardous consumer article is a ‘food’ determines as well whether consumers are to be protected from risk of injury or illness by CPSC pursuant to the CPS Act or by the FDA pursuant to the FDC Act.” The MOU accepts as “food components and thus food” within the meaning of the FDA Act, those food containers which have contact surfaces “from which there is migration of a substance from the contact surface to the food” and subject to regulation by the FDA. It was acknowledged that the FDA has jurisdiction over a food container when the food container “is composed, in whole or part, of any poisonous or deleterious substance which may render the [food] contents injurious to health.” Where food containers “present mechanical risks of injury not related to food contamination or spoilage ... [and] do not present a hazard by becoming components of food, they are subject to regulation by CPSC under the [CPS Act].”

In 1978 the FDA issued the “Grade ‘A’ Pasteurized Milk Ordinance” (PMO) as an update to the milk sanitation program administered by the U.S. Public Health Service since the 1924 model regulation, “Standard Milk Ordinance.” This became the basic standard for use in the certification program of interstate milk shippers used by all 50 States, the District of Columbia and U.S. Trust Territories and is recognized by public health agencies, the milk industry, and federal contracting as a national standard for milk sanitation. It is routinely updated through

⁶ The Consumer Product Safety Commission was created in 1972 as an independent agency under the Consumer Product Safety Act of 1972. The Food and Drug Administration is a department of the U.S. Department of Health and Human Services.

⁷ Also referenced by Complainant as “Attachment 19” in his written response to the Show Cause Order.

recommendations by the National Conference of Interstate Milk Shipments (NCIMS).⁸ The latest revision was promulgated in 2007. The PMO sets forth standards for dairy farms and milk plants as well as milk transport. All aspects involved with the handling of milk received from the dairy farm in bulk through the bottling, labeling and conveying of milk within and from the milk plant are addressed. These include the physical construction of the plant, equipment approved for use in the plant, maintenance and handling of the equipment, plant cleanliness, ventilation, hand washing, delivery containers, handling of containers, wrapping and shipping, personnel health, and protection from contamination. The PMO also provides for the “Hazard Analysis & Critical Control Point” (HACCP) program and referenced by the Complainant in his complaints.⁹

In 1997 the Food and Drug Administration Modernization Act amended the Federal Food, Drug and Cosmetics Act and empowered the FDA to regulate “food contact substances.” “The term ‘food contact substance’ means any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.” 21 USC §348(h)(6); 21 CFR §170.3(e)(3). Food product containers containing polymers (plastic packaging and plastic containers) are examples of items falling within the regulatory authority of the Office of Food Additive Safety at the U.S. Food and Drug Administration’s Center for Food Safety and Applied Nutrition.¹⁰

I. Complainant’s alleged September 29, 2008, complaint of violation to a superior about pressurization of the milk filling room because “failure to maintain a positive air pressure volume could contaminate food-products” involves matters within the jurisdiction of the Federal Food and Drug Administration and must be dismissed.

As developed above, food and plastic food container substances are within the jurisdiction of the Federal Food and Drug Administration and are not subject to the Consumer Product Safety Act. The Complainant’s September 29, 2008, complaint “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” and his further explanation regarding this event set forth in his response to the “Show Cause Order” are directed to “food” within the plastic container. Accordingly, that specific portion of his September 29, 2008 complaint must be dismissed since it is not within the jurisdiction of the Act.

II. Complainant’s remaining complaints of violations to superiors involve matters within the jurisdiction of the Federal Food and Drug Administration and must be dismissed.

In view of the legislative, rule-making and agency history set forth above, the only portion of the milk-from-cow-to-consumer process in which the Consumer Product Safety Commission could

⁸ Public Health Service / Food and Drug Administration Publication No. 229, Grade “A” Pasteurized Milk Ordinance, 1999 Rev.

⁹ Grade “A” Pasteurized Milk Ordinance, 2007 Rev.

¹⁰ “Regulatory Report: Assessing the Safety of Food Contact Substances”, USFDA, Food Safety Magazine, August/September 2007. www.fda.gov/Food/FoodIngredientsPackaging/FoodContactSubstancesFCS/

be involved would be related to flaws in milk container design that create choking hazards or mechanical hazards like sharp edges. All other aspects of the milk industry are under the Food and Drug Administration and its use of state and local agencies. The complainant has not set forth a complaint to supervisors involving the design of milk containers manufactured and/or used by the milk plant in which he was employed.

The Complainant states that the whistle blower reports he made that constitute protected activity under the Act, relate to the 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.

The Complainant alleges, as protected activity, in his December 8, 2007, complaint to supervisors that the cleaning of the empty case conveyor system at the plant raised the issue of product containers becoming contaminated with chemical used on the conveyor systems at the Publix manufacturing facility. He alleges, as protective activity, in his December 16, 2007, complaint to the Quality Assurance manager that contamination of the drainage system for the overhead empty case conveyor system, failure of associates to wear hairnets, the use of wood pallets and improperly maintained footbaths “could have resulted in contamination of the Publix packaging containers purchased by consumers.” He alleges, as protective activity, in his December 20, 2007, complaint to supervisors that the use of Sani-Glide on machinery “could reach Publix consumers via transport on product containers purchased by consumers.” He alleges, as protective activity, in his August 14, 2008, complaint that associates were not wiping tools or completing documentation. Finally, he alleges, as protective activity, in his September 29, 2008, complaint about air pressurization of the milk filling room that “bacteria and the like coming from the empty case room” would be injurious to consumers from contamination of Publix product containers. Each of these activities of which he complained to supervisors is addressed by the Food and Drug Administration in their PMO, as noted above.

After deliberation on the administrative record, this Administrative Law Judge finds that the Complainant has failed to allege a violation of Chapter 47 of the Act or any other statute or regulation that is within the jurisdiction of the Consumer Product Safety Commission and his complaint must be dismissed.

III. Complainant has failed to allege protective activity under the Act.

Even if the complaints involving milk plant activities were within the jurisdiction of the Act, the Complainant failed to allege protected activity under the Act.

“Protected activity” under the Act involves (1) providing information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of Chapter 47 of the Consumer Product Safety Act or any other Act enforced by the Consumer Product Safety Commission, 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 concerning such violation; 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

Chapter 47 of the Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under such Acts.

The described conduct which constitutes the violation 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. *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir., 2008); *Welch v. Chao*, 536 F.3d 269, (4th Cir., Aug. 5, 2008), see also *Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) “The reported information must have a certain degree of specificity [and] must state particular concerns, which, at the very least, reasonably identify a respondent’s conduct that the complainant believes to be illegal.” *Bozeman v Per-Se Technologies*, 456 F. Supp. 2d 1282 (N.D. Ga, 2006) citing *Bechtel Constr. Co. v. Sec’y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995).

In order to establish that he engaged in protected activity under the Act, there must be not only reasonable belief of activity that would violate provisions of Chapter 47 of the Act or other regulation enforced by the Consumer Product Safety Commission; but, there must also be manifest an expression of concern over the perceived violation. Without both factors, there is no “protected activity” under the Act. See *Henrich, supra*, at page 11 and 15. 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. General inquires and speculation over possible future adverse product impact do not constitute protected activity. The communication from which the alleged “protected activity” flows involves only what is actually communicated to the covered employer prior to the unfavorable employment action. *Welch v. Chao, supra*, citing *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (ARB, Sept. 29, 2006) and *Fraser v. Fiduciary Trust Co. International*, 417 F. Supp. 2d 310 (S.D.NY., 2006)

The Complainant alleges, as protected activity, his on or about December 8, 2007, complaint to supervisors that the cleaning of the empty case conveyor system at the plant raised the issue of product containers becoming contaminated with chemicals used on the conveyor systems at the Publix manufacturing facility that “**could** reach the consumers through transport of the chemical on product containers purchased by consumers and possibly injuring consumers.” Such speculation is not a report of an actual violation, or a report of an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC. Accordingly, the Complainant has failed to set forth protective activity undertaken by him on or about December 8, 2007 as alleged.

The Complainant alleges, as protective activity, his December 16, 2007, complaint to the Quality Assurance manager that contamination of the drainage system for the overhead empty case conveyor system, failure of associates to wear hairnets, the use of wood pallets and improperly maintained footbaths “**could** have resulted in contamination of the Publix packaging containers purchased by consumers and possibly injuring the consumers.” Such speculation is not a report of an actual violation, or a report of an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC.

Accordingly, the Complainant has failed to set forth protective activity undertaken by him on or about December 16, 2007 as alleged.

The Complainant alleges, as protective activity, his December 20, 2007, complaint to supervisors that the use of Sani-Glide “**could** reach Publix consumers via transport on product containers purchased by consumers and possibly injuring the consumers.” Such speculation is not a report of an actual violation, or a report of an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC. Accordingly, the Complainant has failed to set forth protective activity undertaken by him on or about December 20, 2007 as alleged.

The Complainant alleges, as protective activity, his August 14, 2008, complaint that associates were not wiping tools or completing documentation and that raised a concern “that consumers **could** be injured from contamination of Publix product containers purchased by consumers.” Such speculation is not a report of an actual violation, or a report of an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC. Accordingly, the Complainant has failed to set forth protective activity undertaken by him on or about August 14, 2008 as alleged.

The Complainant alleges, as protective activity, his September 29, 2008, complaint about air pressurization of the milk filling room because “bacteria and the like coming from the empty case room” **would be** injur[ous to consumers] from contamination of Publix product containers purchased by consumers.” Such speculation is not a report of an actual violation, or a report of an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC. Accordingly, the Complainant has failed to set forth protective activity undertaken by him on or about September 29, 2008 as alleged.

After deliberation on the administrative record, this Administrative Law Judge finds that the Complainant has failed to allege protective activity under the Act and his complaint must be dismissed.

CONCLUSION

After deliberation on the administrative record in a manner most favorable to the Complainant, this Administrative Law Judge finds that the Complainant has failed to establish that he communicated to appropriate personnel that an actual violation, or an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban under an Act enforced by the CPSC had occurred or was occurring. Accordingly, the Complainant has failed to state a claim under the Act upon which relief may be granted and the complaint alleged under the Consumer Products Safety Improvement Act of 2008 must be dismissed.

IV. The Respondent is entitled to reasonable attorney fees, not to exceed one thousand dollars (\$1,000.00) pursuant to §2087(b)(3)(C) of the Act.

The federal statute regarding whistle blowing activity under the Consumer Product Safety Improvement Act provides, at 15 USC §2087(b)(3)(C):

“If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys’ fee, not exceeding \$1,000, to be paid by the complainant.”

As noted above, on September 14, 2009, the Complainant filed simultaneous complaints under three different whistle blower statutes based on a series of events involving his employment and termination of employment with the dairy plant of Publix located in Deerfield, Florida. He submitted extensive amendments to his original complaint six separate times between September 30, 2009 and November 30, 2009¹¹.

In his original filings, the Complainant attached a copy of his October 2, 2009, letter to the Deerfield, Florida, Plant Manager which referenced this complaint as well as his complaints under OSHA and Sarbanes-Oxley, and stated, in pertinent part (underline emphasis is as written in the letter):

“Attached hereto please find PDF documents related to OSHA complaints filed by the undersigned against Publix Super Markets, Inc. (Publix) and specific employees of Publix for your review and consideration. To the extent that you are personally named as a respondent in this legal action, you should not directly reply to this letter but instead refer this matter to our company’s legal department. The undersigned is providing you with a copy of the aforementioned documents to put you on notice that whistleblower retaliation claims have been filed against our company and specific employees of our company.

“In addition to the above, a supplemental whistleblower complaint is being provided to OSHA related to the ongoing ‘hostile work environment’ which continues at our facility to date in retaliation directed towards the undersigned in response to my whistleblower activities at our facility to date. To the extent that you are the Publix manager charged with responsibility for the Process Maintenance Department with supervisory authority over Mr. [J.V.], you are hereby requested to take immediate actions to cause Mr. [V.] to cease and desist in [his] retaliatory actions directed towards me as documented in the attached OSHA complaints.

“To the extent that these complaints are likely to become a matter at trial in a public federal court room open to the media, our company’s ‘good’ reputation and standing in the public’s eye may be adversely affected as testimony is taken under oath at trial. Therefore, it is important that we act together to timely resolve these OSHA complaints before they become a public record in open federal court. Please communicate to your superiors and to our legal department that the undersigned is willing to negotiate a fair and equitable settlement of the attached OSHA complaints at the earliest possible opportunity and before they become a public record at trial in federal court.”

The December 10, 2009, determination letter sets forth that the “Complainant was informed by OSHA at the time of his filing that food safety complaints were not covered under CPSIA.

¹¹ Original filings by the Complainant as well as Attachments 2 through 7 of Complainant’s response to the Show Cause Order.

Complainant declined to withdraw his complaint.” Accordingly, the Complainant was on actual notice on September 14, 2009, that he could not proceed under the Consumer Product Safety Improvement Act with the current complaint. Notwithstanding this notice, the Complainant proceeded to use a threat of “public record” through pursuit of this complaint to demand specific actions of supervisors and solicit “a fair and equitable settlement” in his October 2, 2009 as cited above.

In the December 10, 2009 determination the Complainant was again notified in writing that the specific complaints referred to food (milk) processing that was within the jurisdiction of the Food and Drug Administration and not within the scope of the Consumer Product Safety Improvement Act. The specific finding entered at the end of the determination letter was:

“A preponderance of the evidence indicates that Complainant’s food safety complaints are not covered by CPSIA and cannot be pursued by OSHA. Consequently, this complaint is dismissed.”

In his appeal to the Office of Administrative Law Judges, the Complainant quotes the determination finding above and stated:

“The undersigned Complainant, [T.S.], hereby files his objection to the findings of OSHA as described above and respectfully requests a formal hearing on the record before an administrative law judge to decide the merits of the complaints filed in this matter accordingly.”

In her December 10, 2009 determination letter, the District Director reports:

“Respondent alleges Complainant was made aware by OSHA at the time of Complainant’s CPSIA filing that food safety complaints were not covered by CPSIA. Respondent maintains the Complainant’s pursuit of the matter constitutes a ‘frivolous complaint’ under CPSIA. Respondent requests OSHA pursue the ‘frivolous’ complaint fine of \$1000 from the Complainant to cover Respondent legal fees; as allowed under CPSIA for the filing of ‘frivolous’ complaints.”

As previously noted and documented in footnote 2, the Complainant has made extensive use of the various federal whistle blower statutes, all without representation. Through his repetitive filings he has been made aware of the requirements to present proper issues for resolution, and the role of OSHA in conducting investigations. In his complaints he quotes the necessary requirements for a whistle blower complaint under the Act; but as noted above, has failed to set forth any violation that occurred or was occurring that was within the jurisdiction of the Consumer Product Safety Improvement Act. He was counseled that his complaint was not within the Act on September 14, 2009. He was advised in writing by the December 10, 2009 determination letter that his complaints were not covered by the Act. He was also advised in writing by the December 10, 2009 determination letter that the Respondent was seeking reasonable attorney fees under the Act for the Complainant’s “frivolous complaint.” Notwithstanding these events, the Complainant persisted in pursuing his complaint under the Act to the Office of Administrative Law Judges.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Complainant is knowledgeable in the general provisions and requirements of federal whistleblower statutes; that the Complainant is knowledgeable in the specific requirements of whistle blower complaints under the Consumer Product Safety Improvement Act of 2008; that the Complainant was properly advised by federal authorities on two separate occasions that his complaints were under the Food and Drug Administration's jurisdiction and could not be pursued under the Consumer Product Safety Improvement Act of 2008; that the Complainant delivered a letter to Respondent's agent, after being advised that his complaint could not be pursued under the Consumer Product Safety Improvement Act, which demonstrates at least a "bad faith" proceeding if not attempted extortion; that the Complainant's numerous supplemental filings demonstrate a pattern of harassment and intimidation amounting to "bad faith" proceeding; and that the Complainant's pursuit of a formal hearing in this matter has been made in "bad faith". Accordingly, this Administrative Law Judge finds that the Respondent is entitled to reasonable attorneys' fee, not exceeding \$1,000.00 to be paid by the complainant directly to Respondent pursuant to 15 USC §2087(b)(3)(C).

In order to establish reasonable attorney fees in this case for the period this case was before the Office of Administrative Law Judges in "bad faith," Respondent's attorney will be required to submit a detailed statement of legal fees incurred during the period commencing January 5, 2010 through March 5, 2010.¹² The time expended in preparing the fee petition may also be included when the "Loadstar" computation method is applied as implemented within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit. A copy of the fee petition filed with the Court is to be served by first class mail upon the Complainant who may submit his objections thereto within the time allotted.

CONCLUSIONS AND FINDINGS OF FACT

After deliberation on all the evidence of record, this Administrative Law Judge finds that:

1. The Complainant filed simultaneous complaints, and supplements to his 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).
2. Only the determination entered in OSHA Case No. 4-1050-09-076 is the subject of the current appeal and determination.
3. The Complainant's alleged September 29, 2008, statement to his superior about pressurization of the milk filling room possibly contaminating food-products involves matters within the jurisdiction of the Federal Food and Drug Administration.
4. The Complainant's remaining allegations related to the contamination of the outside contact surface of plastic bottles in which food products were packaged, labeled,

¹² The fee petition should indicate the respective legal tasks performed in broad terms, the number of hours expended on the task, the classification of the individual performing the task (partner, senior attorney, paralegal), and the hourly rate requested. The hourly rate should reflect the market value of such services in the U.S. Courts system for the Southern District of Florida.

distributed and sold to consumers at Publix retail stores involves matters within the jurisdiction of the Federal Food and Drug Administration.

5. The Complainant has failed to establish that he communicated to appropriate personnel that a violation, or an ongoing violation, of any provision of Chapter 47 of the Act or any other order, rule, regulation, standard, or ban enforced by the Consumer Product Safety Commission, had reasonably occurred or was reasonably occurring.
6. The Complainant has failed to state a claim under the Act.
7. The Complainant's pursuit of this complaint before the Office of Administrative Law Judges was made in "bad faith."
8. The Respondent is entitled to reasonable attorney fees, not to exceed one thousand dollars (\$1,000.00) under the Act.

ORDER

It is hereby Ordered that:

1. **Respondent's counsel is directed to submit a fee petition to the Court by 3:00 PM, Monday, March 22, 2010**, with sufficient documentation to permit computation of the amount of reasonable legal expenses related to this cause of action while before the Office of Administrative Law Judges under the standards set forth by the U.S. Court of Appeals for the Eleventh Circuit.
2. **Respondent's counsel is directed to send a copy of said fee petition to the Complainant at the same time said petition is submitted to the Court.**
3. **Complainant is directed to file with the Court by 3:00 PM, Monday, April 12, 2010**, any and all specific objections he may have to Respondent's counsel's fee petition.
4. **This Court shall retain initial jurisdiction over the issue of reasonable attorney fees incurred while before the Office of Administrative Law Judges as provided by U.S. Code, Title 15, Section 2087(b)(3)(C).**
5. The above captioned Complaint set forth under the Consumer Product Safety Improvement Act of 2008 is hereby **DISMISSED**.
6. The Parties may file the respective fee petition and objections thereto, if any, by facsimile transmission provided that the documents submitted do not exceed 12 pages in length, including the cover sheet.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶ 5.c.5. of Secretary's Order 01-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.