



**Issue Date: 15 May 2020**

**Case No.: 2018-CPS-00002**

In the Matter of:

**JEREMY ARNETT**  
**Complainant**

v.

**HILMAR CHEESE COMPANY**  
**Respondent**

**APPEARANCES:** Jeremy Arnett, Pro Se Litigant  
For Respondent, Liz Larson, Esq.

**BEFORE:** Hon. Tracy A. Daly  
Administrative Law Judge

### **DECISION AND ORDER**

**1. Jurisdiction and Procedural History.** This claim arises under the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2807, and its implementing regulations 29 C.F.R. Part 1983. This case also rises under the employee protection provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 301 *et. seq.*, as amended by Section 402 of the Food Safety and Modernization Act of 2011 (FSMA), 21 U.S.C. § 399(d), and its implementing regulations at 29 C.F.R. § 1987 (2018).

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated the CPSIA and the FSMA when it terminated Complainant's employment. OSHA investigated, concluded Respondent did not violate either statute, and dismissed the complaint. Complainant objected and requested a hearing before the Office of Administrative Law Judges (OALJ). The formal hearing in this case was conducted on August 26-27, 2019 in Amarillo, Texas. The parties were afforded a full opportunity to adduce testimony and offer documentary evidence.<sup>1</sup> Complainant and Respondent filed post-hearing

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<sup>1</sup> Exhibits are marked as follows: AX for Appellate Exhibits, JX for Joint Exhibits, CX for Complainant Exhibits, and RX for Respondent Exhibits. Reference to an individual exhibit is by party designator and page number (*e.g.* CX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (*e.g.* Tr. p. 3).

briefs with legal analysis and factual arguments on January 16, 2020 and January 21, 2020, respectively.<sup>2</sup> Respondent filed a supplemental reply brief on January 31, 2020.<sup>3</sup>

**2. Statement of the Case.** Complainant contends he suffered an adverse action under the CPSIA and FSMA when Respondent terminated his employment under the guise of poor performance and behavior after he internally reported possible OSHA violations with respect to inoperable safety features on Respondent's equipment. In response, Respondent argues Complainant did not engage in any protected activity under either statute and it terminated Complainant's employment for unsatisfactory performance and insubordinate behavior in accordance with Respondent's "Corrective Action Process." Due to Complainant's repeated instances of disrespectful behavior, Respondent contends it would have taken the same adverse action in the absence of any protected activity. Moreover, Respondent argues any alleged protected activity was not a contributing factor because the decision-makers did not have knowledge of the alleged protected activity.

**3. Contested Issues of Fact and Law.** Based on the parties' prehearing statements, opening statements, stipulations, evidence presented during the hearing, and the parties' post-hearing briefs, the undersigned identified the following contested legal issues in this matter:

- a. Whether Respondent is a covered entity under the CPSIA.
- b. Whether Complainant engaged in protected activity under the CPSIA and FSMA.
- c. Whether Respondent had actual or constructive knowledge of Complainant's protected activity.
- d. Whether Respondent took an adverse action against Complainant.
- e. Whether the protected activity was a motivating factor in the adverse action.

**4. Relevant Evidence Considered.** In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondent. This decision is based upon the entire record.<sup>4</sup>

a. ***Stipulated Facts.*** The parties entered into a stipulation regarding a number of uncontested facts in this case. The undersigned accepted the parties' stipulation as uncontroverted facts in this matter, and they are included in the undersigned's relevant and material findings of facts. (AX-18; Tr. p.11).

b. ***Exhibits Admitted Into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. However, as specifically provided in the undersigned's Notice of Case Assignment and Prehearing Order and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but

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<sup>2</sup> Complainant's post-hearing brief is marked CB-1. Respondent's post-hearing brief is marked RB-1.

<sup>3</sup> Respondent's reply brief is marked RB-2.

<sup>4</sup> As the Administrative Review Board (ARB) stated its recent *Austin* decision, ALJs should tightly focus on making findings of fact and "a summary of the record is not necessary" because the ARB assumes the ALJ reviewed and considered the entire record. *Austin v. BNSF Railway Co.*, ARB No. 17-024, slip op. at 2, n.3, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam).

not specifically cited in the briefs, was regarded as non-relevant background information provided for chronological context to cited relevant evidence. (Tr. pp. 377-381).

1) Joint Exhibits. The parties jointly offered 13 exhibits, which the undersigned admitted into evidence. (Tr. pp. 12-13).

2) Complainant Exhibits. Complainant offered 9 exhibits, marked as Exhibits A through I for identification. Respondent's objections were overruled and the undersigned admitted the exhibits into evidence. (Tr. pp. 17, 140-141).

3) Respondent Exhibits. Respondent offered 58 exhibits, which were admitted into evidence without objection. (Tr. pp. 18-19).

**c. Testimonial Evidence and Witness Credibility Determinations.** The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, to draw his own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. An administrative law judge has the authority to address witness credibility and to draw his own inferences and conclusions from the evidence. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the matter at issue. The ALJ also considered the extent to which the testimony of each witness was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

a. Complainant. (Tr. pp. 24-120).

Complainant testified regarding his complaint to superiors that he believed Respondent's equipment was not in compliance with OSHA requirements. Specifically, Complainant testified that he reported the sensors on the fume hoods were inoperable and that ether was escaping into the lab. Complainant also testified that he was terminated on the basis of this reporting, and that Respondent had a history of mishandling safety reports.

Complainant's testimony is generally credible. Although Complainant's testimony regarding the functionality of the fume hoods is consistent, there are internal inconsistencies as well as contradictory documentary evidence with respect to other issues.

As one representative example of these contradictions, Complainant testified he sent Mr. Adeboyejo an e-mail stating that he "wanted to start inspecting the equipment to check and make sure that it was up to the OSHA standards." (Tr. p. 43). Complainant admitted this e-mail did not contain any specific reports of safety concerns, which is supported by the documentary evidence.

However, Complainant simultaneously denied having received a response and testified that Mr. Adeboyejo informed him that “they were investigating [his] concerns.” *Id.* Complainant’s testimony that he had not received a response is contradicted by the documentary evidence, which shows that Mr. Adeboyejo replied to Complainant, answering each of the points raised in numbered format. RX-47.

b. Mr. Hiram Roman Chavez. (Tr. pp. 141-222).

Mr. Roman<sup>5</sup> is the Human Resources Manager at Hilmar Cheese Company. Mr. Roman testified as to Respondent’s corrective action process, safety and injury reporting procedures, and the ultimate decision to terminate Complainant.

Mr. Roman’s testimony was moderately credible. He provided a detailed account of a complex termination process which included informal, undocumented discussions and an opaque appeals process, all of which Mr. Roman testified was the regular course of business. However, his testimony was not without inconsistencies.

Mr. Roman’s descriptions of Complainant’s behavior was overstated. He testified that in a past interaction Complainant had behaved violently and aggressively. When pressed, however, Mr. Roman clarified this to mean that Complainant had been demanding and raised his voice. (Tr. pp. 196-197).

Additionally, Mr. Roman testified that aside from workers’ compensation cases, he did not receive safety reports and had no knowledge of Complainant’s OSHA complaint. (Tr. p. 159). However, Mr. Paul Adeboyejo later credibly testified that Mr. Roman had knowledge of the OSHA complaint, as he had been informed during the phone call that culminated in Complainant’s final suspension. (Tr. p. 332).

Mr. Roman’s testimony that he had no knowledge of Complainant’s OSHA report is also contradicted by the documentary evidence. A September 20, 2017 e-mail copying the witness stated that “Jeremy started threatening us that he will review the OSHA regulations and find out which laboratory equipment’s [*sic*] are not compliant and he will put a red tape on those equipment’s [*sic*] until they are fixed and he will not do his duties on those equipment’s [*sic*] until they are fixed.” (JX-12, p. 2).

c. Ms. Gabriela Araujo. (Tr. pp. 223-312).

Ms. Araujo is the current Laboratory Services Coordinator at Hilmar Cheese Company. For the period of 2016 through 2017, including the time period in which Complainant was terminated, Ms. Araujo worked as Complainant’s direct supervisor, the Cheese and Chemistry Lab Supervisor. She testified as to Complainant’s work production and behavior, and a meeting she and then Laboratory Services Coordinator, Mr. Amit Lachhwani, held with Complainant immediately prior to his termination.

Ms. Araujo’s testimony is wholly credible. Her testimony regarding Complainant’s

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<sup>5</sup> Hiram Roman Chavez noted the preference for Mr. Roman on the record. Tr. p. 144.

history of receipt of Notice of Corrective Action and his lackluster work performance while working in her department was internally consistent and supported by documentary evidence. Specifically, her testimony that she often had to remind Complainant of daily tasks is corroborated by an e-mail correspondence in which she outlines Complainant's daily tasks. (CX-H, p. 1).

Additionally, Ms. Araujo's testimony that she felt uncomfortable alone with Complainant due to his aggressive behavior while at work was also corroborated by the testimony of Paul Adeboyejo. (Tr. 256, 329-330). With respect to the final meeting with Complainant in which he raised safety concerns, Ms. Araujo's account that Complainant did not identify specific equipment but instead informed her and Mr. Lachwanni that Complainant would "red tape" all of the equipment he found to be non-OSHA compliant is also corroborated by documentary evidence. (JX-12, p. 2; Tr. 270).

d. Mr. Paul Adeboyejo. (Tr. pp. 314-374).

Mr. Adeboyejo is the Food Safety & Compliance Manager and Quality Assurance Manager for Respondent's Dalhart site. He testified generally as to the methods by which an employee could report safety concerns and the investigation of said concerns. Mr. Adeboyejo also testified as to Complainant's specific report of issues with the fume hoods, incidents regarding Complainant's behavior, and the recommendation to terminate Complainant.

Mr. Adeboyejo's testimony was largely credible. He provided detailed answers that were both internally consistent and consistent with the documentary evidence. Aside from his testimony in which he "believe[d] that [he] did communicate" the OSHA complaints to Mr. Roman, which contradicts Mr. Roman's testimony, Mr. Adeboyejo's testimony is supported by other witnesses testimony and the documentary evidence. (Tr. pp. 159, 332).

Notably, Mr. Adeboyejo testified that he informed Complainant that the OSHA complaints would be investigated while Complainant was suspended, which is consistent with Complainant's account. (Tr. p. 333; CB-1, p. 1).

**5. Relevant and Material Findings of Facts.** Based on the parties' stipulations, documentary exhibits, and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:<sup>6</sup>

a. Respondent is a manufacturer of cheese, whey protein, lactose, and milk powders. Respondent is not a manufacturer of non-food products. (AX-18). Cheese, whey protein, lactose, and milk powders are not consumer products.

b. Respondent hired Complainant as a Security Officer on September 23, 2013. On November 24, 2014, Complainant was transferred to the position of Dal-Whey (Protein) Operator. Effective July 8, 2015, Complainant was transferred to the position of Dal-Cheese

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<sup>6</sup> Citations to stipulations or exhibits that support the undersigned's factual findings are not all-inclusive. They simply reference some of the most persuasive evidence among everything in the record that the undersigned considered when making the related finding.

Packing Operator. On December 7, 2015, Complainant was transferred to the position of Cheese Lab Technician, which he held until he was terminated on September 22, 2017, although at some point he was assigned the role of “floater.” At all times during his employment with Respondent, Complainant worked at the Hilmar Cheese manufacturing facility in Dalhart, Texas. (AX-18).

c. While working in the Quality and Food Safety Department, Complainant reported to Ms. Gabriela Araujo, the Cheese and Chemistry Lab supervisor. Ms. Araujo reported to the Laboratory Services Coordinator, Mr. Amit Lachhwani, who reported directly to Mr. Paul Adeboyejo, the manager of the Quality and Food Safety Department.

d. On September 23, 2013, Complainant signed a "Confirmation of Receipt of Handbook," confirming his receipt of the Hilmar Cheese Employee Handbook, which outlines Hilmar Cheese's Corrective Action Process and details Hilmar Cheese's Standard of Conduct for its employees. The corrective action process includes (1) verbal warning; (2) written warning; (3) suspension of employment without pay; and (4) termination of employment. (AX-18).

e. Prior to his termination, Complainant received two verbal warnings, three written warnings, and two 1-day suspensions for reasons which included unsatisfactory job performance, poor attitude, and insubordination. (AX-18, pp. 2-3).

f. Specifically, Mr. Arnett received the following corrective action prior to September 2017:

- i. On February 23, 2015, Arnett received a Notice of Corrective Action. Specifically, Arnett received a “verbal warning” for the provided-reason of “Unsatisfactory Performance of Duties.”
- ii. On January 6, 2017, Arnett received a Notice of Corrective Action from Amit Lachhwani. Specifically, Arnett received a “verbal warning” for the provided-reason of “Job Performance: Unsatisfactory Performance.”
- iii. On July 12, 2017, Arnett received a Notice of Corrective Action from Gabriela Araujo. Specifically, Arnett received a “written warning” for the provided-reason of “Job Performance: Other.”
- iv. On July 12, 2017, Arnett also received a Notice of Corrective Action from Amit Lachhwani. Specifically, Arnett received a “written warning” and a “1-Day suspension” for the provided-reason of “Behavior: Attitude” and “Behavior: Other.” Arnett served his one-day suspension on July 23, 2017. Pursuant to this Notice of Corrective Action, Arnett was also required to submit to Hilmar Cheese a “Letter of Commitment.” Accordingly, on July 19, 2017, Arnett submitted a “Letter of Commitment” in which he stated, “I understand that a continued bad attitude and unwillingness to listen when conversations turn sour will result in

further disciplinary action including termination.”

- v. On July 12, 2017, Arnett received a second Notice of Corrective Action from Amit Lachhwani. Specifically, Arnett received a “written warning” for the provided-reason of “Behavior: Attitude” and “Behavior: Insubordination.”
- vi. On July 18, 2017, Arnett received a Notice of Corrective Action from Paul Adeboyejo. Specifically, Arnett received a “written warning” and a “1-Day suspension” for the provided-reason of “Behavior: Attitude” and “Behavior: Other.” Arnett served his one-day suspension on July 18, 2017.

(AX-18).

g. On September 20, 2017, Complainant attended a meeting with his supervisors Amit Lachhwani and Gabriela Araujo. During that meeting, Complainant requested that a human-resources representative be present. A human-resources representative was not available at that time, however, so the meeting was ended and rescheduled for the following Monday. At that point, Complainant left the meeting. (AX-18).

h. Shortly after leaving the September 20, 2017 meeting for the first time, Complainant returned to voice his refusal to train a new employee. When asked to close the office door to continue this discussion, Complainant refused. Eventually, Complainant turned and left the office doorway for the second time. (AX-18).

i. Within a minute or so of leaving the September 20, 2017 meeting for the second time, Complainant returned for a third time. This time Complainant raised issues of "non-specific" OSHA violations. (AX-18).

j. On September 20, 2017, Complainant reported to management that the sensors on the fume hoods were malfunctioning in violation of OSHA standards. Complainant also informed his department manager, Paul Adeboyejo, by e-mail that he intended to review all of the equipment “for OSHA violations on [his] own time and anything that does not meet specifications will be red tagged as unusable.” (RX-47).

## **6. Applicable Law and Analysis.**

a. *The Parties’ Arguments.* Complainant alleges Respondent committed prohibited discrimination under 15 U.S.C. § 2807 and 21 U.S.C. § 399d when it ended his employment after he reported his concerns that Respondent’s equipment was “not up to OSHA standards in regards to inoperable safety features.” (CB-1, p. 1). Specifically, Complainant asserts he was concerned that the air flow sensors in the fume hoods were inoperable, thus exposing employees to ether by not allowing the chemical to escape the hood. Complainant argues the close temporal proximity of Respondent’ termination of his employment establishes that his e-report was a contributing factor in that decision.

In response, Respondent argues that the CPSIA does not apply to Hilmar Cheese because it is not a manufacturer of consumer products as defined by the implementing regulations. Further, Respondent argues that Complainant did not engage in protected activity because his reported concerns pertained to possible OSHA violations rather than any safety requirements imposed by the CPSIA, the FFDCFA, or one of the several acts enforced by the Consumer Product Safety Commission.

Respondent also maintains that, even if Complainant's action constituted protected activity, his employment termination was not adverse action in retaliation for his report. Rather, Respondent asserts that Complainant's employment was terminated because he failed to satisfactorily perform his required job tasks and his conduct repeatedly violated the company's standards of conduct. Additionally, Respondent maintains that, even if Complainant's employment termination constitutes adverse action, his report concerning the fume hoods was not a contributing factor to the adverse action. Lastly, Respondent maintains it can demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action against Complainant in the absence of his alleged protected activity.

b. ***Elements of CPSIA Claim.*** No manufacturer, private labeler, distributor, or retailer, may discharge any employee for disclosing or providing information the employee reasonably believes to be a violation of any provision of Chapter 47 of Title 15 or any other Act enforced by the Consumer Product Safety Commission, or any order, rule, regulation, standard, or ban under any such Acts. 15 U.S.C. § 2087(a)(1).

Respondent avers that the OALJ lacks subject matter jurisdiction under the CPSIA because Hilmar Cheese is not a covered entity, *i.e.*, a manufacturer of consumer products. Subject matter jurisdiction "refers to a tribunal's power to hear a case." *Snyder v. Bechtel Int'l Oil, Gas, & Chem.*, ALJ Case No. 2015-CPS-00004 (2015) (quoting *Morrison v. Nat'l Australian Bank*, 561 U.S. 267 (2010)). "The Department of Labor's subject matter is invoked when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is obviously not frivolous." *Snyder*, 2015-CPS-00004 at 10 (quoting *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-007, slip op. at 3 (ARB Aug. 31, 2000)).

Complainant argues that lactose "is advertised on the Respondent's websites as use as [*sic*] a culture media, which is a consumer product" pursuant to the CPSIA. (CB-1, p. 1). Complainant did not explain as to why a culture media is a consumer product, although Respondent interpreted this to mean that it manufactures "a food product that can be used to make wood polish." (RB-2, p. 2).

Respondent contends that it is not a manufacturer subject to the CPSIA, arguing specifically that:

Hilmar Cheese is not a "manufacturer, private labeler, distributor, or retailer," as defined by CPSIA. *See* 29 C.F.R. §§ 1983.101(g), (i), (k), and (l). To be subject to CPSIA, Hilmar Cheese must deal in a "consumer product," as that term is defined by CPSIA. *See* 29 C.F.R. § 1983.101(e).

The term “consumer product,” however, explicitly excludes “[f]ood ... as defined in 21 U.S.C. § 321(f) ....” 29 C.F.R. § 1983.101(e)(2)(ix). Pursuant to 21 U.S.C. § 321(f)<sup>7</sup>, “‘food’ means (1) articles used for food or drink for man or other animals ... and (3) articles used for components of any such article.” 21 U.S.C. § 321(f). Hilmar Cheese solely manufactures components used in the processing and manufacturing of whey protein and cheese that is intended for consumption by “man.” (AX-18, pp. 1-2; Tr. pp. 150:12-151:2).<sup>8</sup> Accordingly, Hilmar Cheese is not a “manufacturer, private labeler, distributor, or retailer,” as defined by CPSIA and, thus, Mr. Arnett’s CPSIA claim fails as a matter of law.

(RB-1, p. 13).

The regulation plainly states that a “[m]anufacturer means any person who manufactures or imports a consumer product. A product is manufactured if it is manufactured, produced, or assembled.” 29 C.F.R. § 1983.101(i). Notably, consumer products do not include food. 29 C.F.R. § 1983.101(e)(2)(ix). The parties stipulated that Respondent solely manufactures cheese, whey protein, lactose and milk powders, all of which are food products, and further stipulated that Respondent does not manufacture non-food products. (AX-18, p. 1). The undersigned concludes that such food products are not consumer products under the Act. Therefore, Respondent is not a covered entity under the CPSIA.

Accordingly, Complainant has not established that jurisdiction is proper and therefore his claim under the CPSIA fails as a matter of law. A discussion of whether Complainant engaged in protected activity under the CPSIA is therefore moot.

*c. Elements of FSMA Claim.* No employer may discharge any employee for disclosing or providing information relating to any violation of or any act or omission the employee reasonably believes to be a violation of any order, regulation or standard under Chapter 9 of the FFDCA. 21 U.S.C. § 399d(a)(1).

Respondent contends that the FSMA is inapplicable because reports of OSHA violations are not a protected activity under Chapter 9 of Title 21 of the U.S. Code, arguing that “regulations promulgated by OSHA [are] contained in Chapter 15 of Title 29 of the U.S. Code . . . and therefore, Complainant’s Purported OSHA Complaint is not related to any activity governed by the FSMA [and] his claim fails as a matter of law.” RB-1, p. 17.

The Administrative Review Board (ARB or “the Board”) observed in *Watts v. Perdue Farms, Inc.*, that although “the CPSIA extended whistleblower protection to allegations of violations of any legislative act the Consumer Product Safety Commission regulated, in this matter the FFDCA and the FSMA extend such protection only to allegations of violations of the FFDCA.” *Watts v. Perdue Farms, Inc.*, ARB. No. 2017-0017 at 6, ALJ Case No. 2016-FDA-00003 (ARB Mar. 5, 2019).

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<sup>7</sup> This definition of food arises from The Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by Section 402 of the Food Safety and Modernization Act of 2011 (FSMA), the other act under which this claim is brought.

<sup>8</sup> Originally cited to as “Joint Stipulations at ¶¶ 1-2; Hearing Transcript at 150:12-151:2.”

Complainant argues he believed that he engaged in protected activity under “both FSMA 21 U.S.C. 399D and CPSIA 15 U.S.C. 2087 . . . by bringing to the attention to management that [he] believed the equipment in the Laboratory was not up to OSHA standards in regards to inoperable safety features [*sic*].” CB-1, p. 1. Specifically, Complainant testified that he believed the air flow sensors on the fume hoods were non-operational, and he was concerned that when the ethyl ether and petroleum ether were used to “boil down fats” on a hot plate “in large quantities, [the fume hoods] would flood the labs with the ether vapor,” which might cause respiratory issues. (Tr. pp. 29-30).

Complainant has consistently argued that the protected activity in which he believed he engaged related to violations of OSHA regulations.<sup>9</sup> He has never alleged any violation of the FFDCA, nor has Complainant offered any explanation as to why he believed violations of OSHA regulations were also FFDCA or FSMA violations, despite having been afforded the opportunity to file a reply brief.

Given the statutory constraints, OSHA violations are not subject to the whistleblower protections under the FSMA. Accordingly, the undersigned concludes Complainant has not established that he engaged in protected activity under Chapter 9 of the FFDCA. Therefore, his claim under the FSMA fails as a matter of law.

**7. Decision and Order.** Based upon the above analysis of the contested issues of fact and applicable law in this matter, the undersigned makes the following decision and order:

a. Complainant’s claim under the CPSIA is DENIED based on a failure to establish jurisdiction under the act.

b. Complainant’s claim under the FSMA is DENIED based on a failure to establish he engaged in any activity governed by the act.

**SO ORDERED** this day at Covington, Louisiana.

**TRACY A. DALY**  
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS FOR CPSIA CLAIM:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14)

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<sup>9</sup> Interestingly, the administrative file contains a Whistleblower Case Activity Worksheet, Form OSHA-87, which indicates “OSHA” as the sole “case type,” despite the availability of both the CPSIA and FSMA as “case type” options.

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. E-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).

**NOTICE OF APPEAL RIGHTS FOR FSMA CLAIM:** 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. E-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. &§ 1987.110(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. &§ 1987.110(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. &§ 1987.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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. &§&§ 1987.109(e) and 1987.110(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. &§ 1987.110(b).