



**Issue Date: 12 August 2015**

CASE NO.: 2013-FDA-00001

*In the Matter of:*

COURTNEY J. LAWERY,  
*Complainant,*

v.

THE KROGER COMPANY, Store #641,  
*Respondent.*

Appearances: Courtney J. Lawery  
*Pro Se*  
For Complainant

Paul Oliver, Esq.  
Wimberly, Lawson, Steckel, Schneider & Stine  
For Respondent

Before: Paul C. Johnson, Jr.  
District Chief Administrative Law Judge

**DECISION AND ORDER DENYING COMPLAINT**

This matters arises under the employee protection provisions of the Federal Food, Drug and Cosmetic Act (“FDCA”), 21 U.S.C. § 1021, as amended by the FDA Food Safety Modernization Act, 21 U.S.C. § 339(d), hereinafter “FSMA” or “the Act.” The claim is governed by the Act and implementing regulations found in the Code of Federal Regulations, Title 29, Part 1987 (“the Regulations”). The Act provides protection from retaliation for an employee who has engaged in protected activity pertaining to a violation or alleged violation of the Act, or any order, rule, regulation, standard, or ban under the Act. 29 C.F.R. § 1987.100.

Here, the Complainant Courtney J. Lawery (“the Complainant” or “Mr. Lawery”) alleges he received disciplinary action, unfair treatment, and was terminated by Respondent The Kroger Company (“the Respondent” or “Kroger”) in retaliation for reporting concerns about food handling practices, in violation of the Act.

## PROCEDURAL HISTORY

Mr. Lawery was terminated on January 3, 2013. He filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on February 4, 2013, alleging that he had been subjected to adverse employment action for engaging in protected activity. On August 12, 2013, the OSHA Area Director issued the Secretary’s findings and dismissed Mr. Lawery’s case, finding that (1) there was no reasonable cause to find the Respondents violated the Act, and (2) that the evidence did not support a finding that Complainant’s protected activity contributed to his termination. Mr. Lawery timely filed an objection on August 23, 2013 and requested a hearing before an administrative law judge.

On August 13, 2014, I held a hearing in Atlanta, Georgia. At that time, Complainant’s Exhibits 1, 8–12<sup>1</sup>, and Respondent’s Exhibits 1–20 were admitted into evidence.<sup>2</sup> (TR at 13–15, 18–19, 21, 23–24, 69, 176, 260). Complainant’s Exhibits 2–7 were objected to and excluded from evidence. (TR at 13–19). Four witnesses, including Mr. Lawery, testified. A post-hearing brief was accepted from Complainant, and the record is now closed.

As the Complainant’s protected activity and subsequent termination occurred in Georgia, this case falls under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit.

## ISSUES

The issues contested are as follows:

1. Whether Complainant engaged in protected activity.
2. Whether Complainant was subjected to one or more adverse employment actions.
3. Whether the Complainant’s having engaged in protected activity was a contributing factor in the adverse employment actions.
4. Whether, if the protected activity was a contributing factor, the Respondent would have taken the same adverse action in the absence of the protected activity.

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<sup>1</sup> Complainant’s Exhibit 12, although referred to at the hearing, was not included among the documents offered into evidence. The testimony of Mr. Huff shows that it is similar to Defendant’s Exhibit 1, but the latter includes some follow-up comments. As DX 1 includes the entirety of CX 12, plus additional information, the absence of CX 12 is immaterial, and this decision will issue without a copy of CX 12.

<sup>2</sup> The following exhibit notations apply: TR – Hearing transcript; CX – Complainant’s exhibit; DX – Respondent’s exhibit. I note that at the hearing, Respondent’s exhibits are referred to as “Defendant’s Exhibits,” and each exhibit is marked with a DX.

## SUMMARY OF RELEVANT EVIDENCE<sup>3</sup>

### **I. Complainant's Testimony (TR at 28–126)**

#### *Direct Examination*

Mr. Lawery first began working for Kroger on April 13, 2011. He was hired as a bakery cook, but was unofficially responsible for unloading a delivery truck into the bakery freezer, and then distributing items onto the floor. In December of 2011, Mr. Lawery also assisted in packaging and stocking bakery items. At some point between March and April of 2012, the incident involving the dating of Hawaiian bread occurred. Due to the Easter holiday, the store received larger shipments, and there was not enough room in the freezers. As a result, the employees were directed to place goods in the hallway. After “the initial incident with the Hawaiian bread,” Mr. Lawery’s supervisor held a meeting and said that the truck position would be eliminated. (TR at 29).

The Hawaiian rolls had 14 days to thaw out or, in other words, 14 days of shelf life. Mr. Lawery was asked by Lucy Sanders to put dates on the packages of rolls, approximately 5 days after they were placed in the hallway. Thus, Mr. Lawery believed he had been asked to put a date 14 days in the future on the packages of rolls, and it was his concern that the rolls would be on the shelf 5 days after the actual expiration date.

When asked to date the Hawaiian rolls, Mr. Lawery refused; Ms. Sanders started yelling at him and told him he had to date the rolls. Mr. Lawery explained to Ms. Sanders why he did not want to date the rolls, and that he was concerned a customer would get food poisoning. In addition, other employees and his supervisor would put the wrong dates on items, and he would go behind them and change the dates if he had the time. He had been told by one employee that she usually put “two or three extra days” on the apple fritters. (TR at 37).

When the Complainant made his concerns known in April, he talked to every manager in the store. When he spoke with Ms. Wood, he testified that she told him, “I could schedule you for zero hours. You won’t be able to feed your family, won’t have a check,” and Mr. Lawery understood this to mean that Ms. Wood could “make my life miserable.” (TR at 48). On one occasion, Mr. Lawery was asked to bake because a regular employee was unavailable, and missed a special order. Although he was not trained for the job, he stated that his supervisor, Ms. Wood, was very angry because of the missed order.

In September 2012, Mr. Lawery began to realize that the incorrect dating of products was not an accident. He made a call to EthicsPoint at that time, and reported that he was afraid of being fired because he “had brought some concerns to management about improper dating the Hawaiian rolls.” (TR at 39). He reported to EthicsPoint that prior to the incident, he was treated well by management, but afterward was “given the cold shoulder.” *Id.* After he talked to all the managers in April, Mr. Lawery’s position was eliminated and his hours were cut. Prior to the

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<sup>3</sup> Summaries of testimony and of documentary evidence are not findings of fact. They are simply summaries of the evidence.

incident, Mr. Lawery had suggested a name for the store employee newsletter, which was adopted, but after the incident, the name was no longer used.

On October 31, 2012, Mr. Lawery and Ms. Wood had an issue, and Mr. Lawery agreed to stay at work for an additional 10 to 15 minutes to fix the problem, even though his shift had ended. When Ms. Wood became upset, Mr. Lawery decided to leave and walked to the time clock, which was located in a hallway that was approximately three feet wide. As Mr. Lawery clocked out, he was bumped by Ms. Wood. He testified that he told Ms. Wood that the bump was assault, and that he “could call the police right now because you just assaulted me.” (TR at 46). Mr. Lawery testified that he did not file a complaint about the incident because he wanted to transfer to another store.

The termination arose out of issues that began December 15, 2012. He went to work, and after approximately an hour, he was called into the office and written up. When he returned from the office, he asked his co-worker Ms. Sweeney if she had said anything about him to Ms. Wood. Ms. Sweeney told him that she worked the day before, and Ms. Wood was “yelling and screaming” because merchandise was left in the freezer. Ms. Sweeney also told him that she and another manager, Jonnie, informed Ms. Wood that Mr. Lawery had left the merchandise in the freezer. Mr. Lawery explained that he told Ms. Sweeney she should “be careful because Ms. Wood been harassing me,” and that he was worried about getting fired because he had a family to support. (TR at 50).

With regard to the merchandise left in the freezer, Mr. Lawery was scheduled to work 4.5 hours, and it was not possible for him to move over 400 boxes in that time. However, he managed to get all of the product out to the sales floor. Mr. Lawery believes this occurred on December 12 or December 13, 2012, and that he was not responsible for the condition of the freezer on December 14, 2012. He thinks that the mess in the freezer occurred on a day he was off, and that it was possible Ms. Wood could “have pulled that video.” (TR at 53).

After he was written up on December 15, Mr. Lawery went back to work and talked to Ms. Sweeney. They had a disagreement, but by the end of the conversation they were on good terms. The following day, Mr. Lawery was asked to assist with cupcake decoration, which he was excited about because he wanted to gain baking skills. During that time, he was called into the office. When he entered, he saw Ms. Wood, Ms. Harvell, Courtney Ross, and possibly a manager named Meredith. Mr. Lawery was not sure if there were other individuals also in the room. After he was questioned as to what he had said the previous day, Mr. Lawery was informed that he was suspended upon investigation for harassment. Mr. Lawery denied telling anyone in the office about a shooting in Connecticut; he is not a violent person. He was intimidated by Ms. Wood, and felt that way after she taught him how to use the scanning gun. Mr. Lawery told Ms. Harvell he hoped she would tell the truth, because he knew “we would be in a courtroom one day.” (TR at 58). Mr. Lawery is not interested in getting his job back, or back pay, but wants an apology from Ms. Wood.

Between December 16, 2012 and January 3, 2013, Mr. Lawery did not return to work. He received his termination notice by letter on January 4, 2013. He was not given a reason for his suspension on December 16, 2013, and does not remember whether the termination letter

included a reason. Prior to his suspension, Mr. Lawery's average weekly income varied. Although his hours had been cut, he at first worked more hours than was set on the schedule. The week after he filed his complaint with EthicsPoint, his hours dropped for six weeks. At the time of his suspension, his hourly wage was \$7.45 or \$7.50.

Since he was terminated by Kroger, Mr. Lawery has found employment and makes more than he did at Kroger. He found this job approximately five weeks before the hearing. Mr. Lawery had no idea the police were called to Kroger. He has not returned to the particular store where he worked, although he continues to shop at other Kroger locations. Mr. Lawery enjoyed his work, and took time to put the products on display. His display of angel food cakes earned his supervisor a gift card. Mr. Lawery did not want anyone to get fired, and he did more than he was required because he wanted to ensure Ms. Sanders did not get fired. He was embarrassed because Ms. Sanders had been demoted the week after his report to EthicsPoint.

EthicsPoint is a third party that Kroger employees contact if they have a complaint. EthicsPoint conducts an investigation after the complaint is submitted.

### Cross Examination

Prior to the incident in April 2012, Mr. Lawery had not had to deal with any requests to mark goods inappropriately. It was part of his job to date goods, but he was not taught to date goods under the corporate policy. Normally, when products such as the Hawaiian rolls came in, they came in frozen and were stored in the freezer. Before the rolls went out on the floor, they would be marked 14 days from the day they were in the freezer as the expiration date, which was the manufacturer's policy. Mr. Lawery said often the products were not dated individually, and the product boxes were not dated until he had "something about it." (TR at 76).<sup>4</sup>

Ms. Sanders asked Mr. Lawery to engage in the improper dating of the rolls. He knew the rolls were put in the hallway because of a large distribution at least five days before the date of the incident. At the time, Ms. Sanders was the bakery manager. Ms. Sanders asked Mr. Lawery to get the rolls that had been in the hallway and date them, and provided him with an incorrect date. The date was wrong because it did not take into account the five days that the rolls had been out of the freezer. When Ms. Sanders instructed him to set the date as "14 days from today," Mr. Lawery refused. (TR at 87). Ms. Sanders told Mr. Lawery he had to date the rolls, but he continued to refuse.

Mr. Lawery does not remember if he was written up after the incident, but Ms. Wood "threatened to cut my hours down to zero." (TR at 88). This interaction with Ms. Wood occurred a few days after the incident. During this meeting Ms. Wood spoke first with Mr. Lawery about his tardiness and his performance. Mr. Lawery explained that Ms. Wood spoke with him about how he did not get enough work done in the time he was scheduled. Then, Mr. Lawery raised the issue of the Hawaiian rolls incident. Prior to this meeting, Ms. Wood had only had one discussion with Mr. Lawery about his tardiness. Mr. Lawery also agreed that he was never

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<sup>4</sup> Mr. Lawery also described in great detail how he dated the products; this testimony will not be summarized, as it is not material to the decision. In addition, Mr. Lawery referred to an email in evidence from Ms. Eula that indicated he had dated rolls correctly; however, there is no such email in evidence.

formally disciplined with respect to the issue in which he neglected to bake rolls and Ms. Wood gave a customer a \$50.00 gift card.

Mr. Lawery did not report the Hawaiian roll incident until August or September of 2012. The day after the incident, he worked less on the truck and did not date the products as much. Mr. Lawery made the EthicsPoint complaint on August 25, 2012. He had complained because his hours had been cut from 28 to 32 hours to 10 to 15 hours per week. Mr. Lawery was a part time worker, and was only available to work the night shift after January 2012. He believes he was told that as a part time worker, he would work 24 to 32 hours per week. He denied that his hours were not substantially reduced.

On Halloween, after he had filed the EthicsPoint complaint and his hours were reduced, Ms. Wood asked Mr. Lawery to put more pudding and pound cakes on display at the end of his shift. Mr. Lawery said that he would add more to the display, but could only stay 15 minutes beyond the end of his shift. Ms. Wood began to argue with him and “came to me in a way that I felt like was, you know, unbecoming of a manager in her position.” (TR at 104). As Mr. Lawery clocked out, Ms. Wood “aggressively bumped me.” *Id.* He did not know Ms. Wood was approaching him, and that after the bump, she stopped on her way upstairs because he told her he could file assault charges. Ms. Wood “looked at me on the stairs and gave out a grunt like ahhh, and kept on up the stairs.” (TR at 106). The incident did not feel like a bump; Ms. Wood used force and almost knocked him off his feet.

The next discipline Mr. Lawery received was a constructive advice record on December 15, 2012. He initially was spoken to by Mr. Meredith, who asked him to sign the record. Mr. Lawery refused to sign because he did not agree that he had done what the record indicated. He had unloaded the truck properly and did not push the product into the freezer as alleged. After leaving Mr. Meredith’s office, Mr. Lawery went downstairs and found his coworkers Nate and Ms. Sweeney “fraternizing,” and told them they “might want to go back to work, because there might have to be a video pulled of tonight and you don’t want to be on video fraternizing.” (TR at 110). Then Mr. Lawery asked Ms. Sweeney if she had said anything to Ms. Wood about him. Ms. Sweeney responded that she had, and she and Mr. Lawery had a five or ten minute conversation.

Ms. Sweeney made a statement, in evidence as DX 11; parts of her statement were untrue. Mr. Lawery does not use the word “crap,” and although the statement did “touch on what we talked about,” parts of the statement were “just completely false.” (TR at 111). He did not tell Ms. Sweeney that she or their co-worker Jonnie would go to hell. Mr. Lawery didn’t think Ms. Sweeney had made a report to management that he was at fault for the condition of the freezer prior to December 15, but he did ask Ms. Sweeney if she had said anything to Ms. Wood. He denied complaining about Ms. Sweeney talking behind his back; he told Ms. Sweeney that Ms. Wood had “been trying to get rid of me for a long time, and just please be careful because I have family at home.” (TR at 112–13).

Although he had not gone and looked at the security monitors at the store, Mr. Lawery had worked in security before and knew that the cameras in the store would show what he did and did not do. He did not tell Ms. Sweeney that she was a “pretty little white girl that anyone

would hire,” and did not tell her he was from Florida and “people from Florida don’t put up with this crap.” (TR at 115). Mr. Lawery said to Ms. Sweeney that the “culture is different here than it is in Florida,” and again denied using the word “crap.” *Id.* With respect to comments made about their co-worker Jonnie being an atheist, Mr. Lawery said he was a Christian and Jonnie was an atheist, but did not tell Ms. Sweeney not to socialize with Jonnie because of her beliefs. He also did not tell Ms. Sweeney that Jonnie was an atheist and would go to hell, but believes atheists “might have a better chance of getting into heaven.” (TR ta 116). He did not tell Ms. Sweeney that she “better tell Ms. Wood and Jonnie that they got something coming for them, because I’m not dealing with this.” *Id.* Mr. Lawery would often help his co-workers and cover their shifts, and frequently helped Ms. Sweeney, and would have helped Jonnie if she had asked.

There was a “table full of people,” including Ms. Wood, Ms. Harvell, and Courtney Ross, at the meeting on December 16, 2012. (TR at 118). Mr. Lawery was not aware at the meeting that Ms. Sweeney had reported the incident, and he stated he agreed with the Kroger policy regarding harassment. At the meeting, Ms. Wood told Mr. Lawery he would be suspended pending an investigation. After the meeting, Mr. Lawery passed Ms. Harvell in the hallway and told her that “there’s going to come a time where you’re going to be called to tell the truth and I just hope when that time comes, you’re going to stand up and say the truth.” (TR at 120). Mr. Lawery explained that the reference to the Connecticut shooting “hurt me the most” because his statement was taken out of context. (TR at 120–21). He was upset by the Connecticut shooting, and told Ms. Harvell that “evil is around, you know, we saw what happened in Connecticut . . . as it relates to good and evil, you know, that’s just evidence of it . . . there’s going to come a time, you’re going to have to tell the truth.” (TR at 123). Mr. Lawery never used the phrase “what goes around comes around,” or “you reap what you sow,” and that if Mr. Ross stated he heard those phrases, he was incorrect. (TR at 124).

Mr. Lawery filed a union grievance after his suspension, in which he had a spokesperson. The grievance was denied, and his termination was upheld and became final. With respect to the scheduling after the Hawaiian rolls incident, Mr. Lawery thought Ms. Wood did the scheduling, and if she did not have overall responsibility for the scheduling, she had oversight.

## **II. Elizabeth Wood Testimony (TR at 128–97)**

### **Direct Examination**

Ms. Wood was formerly employed as the unit manager at Kroger Store 641, and had been employed there from the opening of the store in October 2009 until July 22, 2014, when she retired. During the time that Mr. Lawery was employed by Kroger, Ms. Wood was the store manager. She or a co-manager would schedule part-time employees by submitting a budget into the system, and the system would tell the managers how many hours could be used based on sales. The hours would then be sent to department heads, who would manually write a schedule based on the contract, which would be ordered based on seniority and availability. After the department head wrote the schedule, it would be reviewed by Ms. Wood or one of the co-managers to ensure the schedule was within the guidelines and following the contract. The store had approximately 190 employees, 35 of which were full-time.

Sometime in the middle or towards the end of the summer in 2012, the scheduling system was switched to an e-scheduling program so that associates could submit their requests and the system would write the schedule. The e-scheduling system would write the schedule based on the same criteria as the managers used for manually writing the schedule.

In April 2012, Ms. Wood was not aware of any incident involving the dating of the Hawaiian rolls. The first time Ms. Wood became aware of the incident was at the end of August or the first of September, when she received a call from Mr. Huff who reported there was an ethics issue. From the information she received, Ms. Wood understood that there was a big display of Hawaiian rolls for Easter, that Mr. Lawery had been instructed to refill the shelf with the rolls from the display and to use the date on the case, and that he refused “because it was not an after date,” and he “didn’t know who extended the product.” (TR at 133). In such displays, the expiration date would be put on the outside of the case rather than dating each product individually. When Courtney was instructed to date the product, he was instructed to put the date that was on the case. No one ever told Ms. Wood, including Mr. Lawery, that they were being told to put a wrong date on an item.

Ms. Wood was contacted by Mr. Huff about Mr. Lawery’s complaint, and was asked to provide a report of Mr. Lawery’s hours to see if a reduction had occurred. Although Mr. Lawery’s hours varied, they had not been reduced. Normally, a part-time employee must work 12 hours per week and can work a maximum of 38 hours per week. A typical part-time employee worked between 25 and 30 hours per week, based on seniority and availability.

On October 31, 2012, Ms. Wood sent an email to the HR manager, Mr. Huff, after the incident and also put the email in the file. She explained that although at that time she was aware there had been an ethics complaint, she thought it was “a non-issue” because “that was just our standard operating procedure as far as how we handled Hawaiian rolls.” (TR at 136). On October 31, Ms. Wood asked Mr. Lawery to call her before he left work so she could check behind him. When she asked Mr. Lawery about something that was not done, Mr. Lawery “continually deflected the feedback,” and complained that Kroger did not give him enough time to complete his tasks. *Id.* Mr. Lawery told Ms. Wood that he should be at home with his children as it was Halloween, and his voice was raised. Mr. Lawery “made [her] very, very uncomfortable.” (TR at 137).

Ms. Wood told Mr. Lawery to stop yelling at her and to lower his voice. Mr. Lawery “said that we could go upstairs so that I would not be embarrassed on the sales floor,” and she refused to do so. *Id.* Mr. Lawery said he was not going to stay, which confused Ms. Wood because she had not asked him to stay. Ms. Wood told Mr. Lawery on the sales floor that he if did not lower his voice, she “would have to suspend him pending for gross insubordination.” (TR at 138). His response was that he did not have his voice raised. Ms. Wood did not write Mr. Lawery up for this incident.

At around 9:00 p.m. on October 31, Mr. Lawery went to the time clock to clock out, and Ms. Wood was going upstairs and off the sales floor. Ms. Wood stated that she went behind Mr. Lawery in the hallway, which was about three and a half feet from the time clock. As Ms. Wood passed behind Mr. Lawery, he “reached back to clock out, or ... stepped back to go out,” and she

brushed against him. (TR at 138). She believes she “mumbled something like excuse me,” and Mr. Lawery told her she was threatening him. *Id.* Ms. Wood did not intentionally bump Mr. Lawery, and after he made his statements to her, she went upstairs and into her office. The incident made Ms. Wood “uncomfortable,” and she was unhappy with the situation. *Id.* She wrote in her email that Mr. Lawery was not stable and that his behavior was threatening.

Ms. Wood cannot remember why she asked Mr. Lawery to check with her before he left on the night of October 31, but thinks it was about something that had not been done. Between October 31 and December 15, 2012, Ms. Wood did not put anything in Mr. Lawery’s file.

Mr. Lawery had worked the night of December 14, and had worked the night before. Mr. Lawery was supposed to work in the freezer, breaking down the truck, filling the sales floor, and putting what was leftover in the freezer. When Ms. Wood went into the freezer, the product from the truck had not been put away, and Mr. Lawery had not completed his task. Mr. Meredith covered the constructive advice for this incident with Mr. Lawery, and Ms. Wood could not remember if she was present at the meeting.

On December 15, Ms. Wood prepared another constructive advice for Mr. Lawery, but it was never given to him. Ms. Wood explained that it was for failure to follow instructions as Mr. Lawery had baked cookies as instructed, but left the cookies out overnight, did not wipe off the counters, and did not build the cookie display. Mr. Lawery was not presented with this particular constructive advice record because Ms. Wood was informed by an employee named Nate that Ms. Sweeney was “extremely upset.” (TR at 144). Ms. Wood took Nate’s statement after he told her that Ms. Sweeney was “very, very upset and that she and Courtney were in the bakery having words, arguing.” *Id.*

Ms. Wood then went and spoke with Ms. Sweeney. Ms. Sweeney gave a statement and was upset that Mr. Lawery was talking to her. Ms. Wood repeated the contents of Ms. Sweeney’s statement and clarified that she did not overhear, and was not a part of the conversation. Once Ms. Sweeney wrote her statement, Ms. Wood spoke with Mr. Huff and sent the statements on to him. Ms. Wood understands that the conversation occurred between Ms. Sweeney and Mr. Lawery because Mr. Lawery “felt that [Ms. Sweeney] had tattled on him or told me that he was the one that had left the stuff in the freezer.” (TR at 147).

After Ms. Wood sent the statements to Mr. Huff, she and Mr. Huff decided to suspend Mr. Lawery pending investigation through a constructive advice record provided to him. The decision was based on the statements made by other employees, and the suspension was for “disregarding established rule and regulation.” (TR at 148). Ms. Wood read the statement, and reported Mr. Lawery had made “offensive remarks regarding other associates’ beliefs,” and had made “statements of pay back toward certain individuals in the store.” *Id.* Ms. Wood read the constructive advice record and the store harassment policy to Mr. Lawery. At the December 16 meeting, Mr. Lawery refused to sign the constructive advice record and stated he would write a statement. Ms. Wood got up and left, and Ms. Harvell, the HR manager, went and made copies.

Ms. Harvell entered Ms. Wood’s office after the meeting and informed her that Mr. Lawery had “come up and talked to her and made reference to the Connecticut shootings,” so

they called Mr. Huff, filed a police report, wrote statements, and obtained a statement from Courtney Ross. (TR at 149). In Mr. Ross's statement, DX 14, he reported he had a conversation after the meeting with Mr. Lawery, who made "several statements regarding how he addressed fellow associates, such as what goes around comes around, and you reap what you sow." (TR at 150). The deli department head, Deborah Washington also provided a statement, DX 13. Ms. Washington reported Mr. Lawery had shown her his constructive advice report and told her he had heard that he offended Ms. Washington and wanted to apologize. Ms. Washington reported Mr. Lawery had made statements that people "within the store are not right and that bad things will happen when you don't do right," and that he quoted scripture to her. (TR at 151).

After the December 16 meeting, Mr. Lawery filed a grievance, and she waived step one in which the store manager, union representative and associate have a meeting. Ms. Wood was not involved in steps two and three. There was also an unemployment claim, and Ms. Wood and Rebecca Clark made a decision not to appeal the unemployment because they did not want to release the names and information of the associates who made statements. Ms. Wood thinks the union grievance was denied. Mr. Lawery received a notice of separation and a notice of termination from Kroger after this denial. The dating of the Hawaiian rolls had nothing to do with the termination of Mr. Lawery. If that incident had not occurred, Mr. Lawery would have been terminated under the circumstances described in the constructive advice record dated December 16, 2012.

#### Cross Examination

Mr. Lawery's work performance was "hot and cold"; some days Mr. Lawery would get his work done and on others he would not complete his tasks. (TR at 154). Hours were assigned based on seniority and availability, but Ms. Wood could not remember who was more senior to Mr. Lawery in the bakery department. Mr. Lawery was trained to bake by someone in the store; bakers are generally trained by someone within the store. Ms. Sanders could have trained Jonnie. Ms. Sanders was demoted in 2012. Ms. Wood discussed several other employees, including an employee who transferred to another store as a result of the grievance process that arose from a mislabeling of product in the meat department.

Ms. Wood cannot remember how Mr. Lawery obtained his baking experience, or whether the suppliers had provided people to work with Kroger's bakers when Mr. Lawery was working. Ms. Wood has seen DX 5 before; the letter was dated April 28, 2012, and the last name of the person who signed the letter was Vickers. Ms. Wood has retired from Kroger, and is not sure what attempts were made to have Ms. Sweeney appear. Ms. Wood understands that Michael Boyd was to contact Ms. Sweeney, who left her job at Kroger in 2013.

Ms. Wood was not present for the interaction between Ms. Sweeney and Mr. Lawery, and asked Ms. Sweeney to write a statement. After she received the statement, Ms. Wood spoke with Mr. Huff and likely sent him the statements, as that was a standard procedure. The corrective action report Mr. Lawery received in December 15, 2012 was a result of leaving "the product on the U-boats"; this was new product which "should have been put away in the freezer in its proper location." (TR at 171). Ms. Wood determined that Mr. Lawery had not put the product away properly by asking who worked the night before; she probably spoke with Jonnie, the bakery

manager, to find out who was responsible. There was not a camera that showed the bakery door or the bakery freezer door. There was no video that would show what happened in the freezer, specifically to show whether Mr. Lawery was responsible for the condition of the freezer on December 14, 2012.

It takes anywhere from 3 to 12 weeks between an initial suspension pending investigation, and termination. With respect to DX 1 and DX 2, changes could be made to the schedule after the e-scheduling system generated the schedule. Ms. Wood then read a Kroger policy about associates, and stated again that she does not remember who handled Mr. Lawery's training. Ms. Wood remembers Mr. Lawery's suggestion that the store newsletter be named the Kroger Chronicles.

Ms. Wood cannot recall whether Mr. Lawery leaned over or almost fell down during the incident at the time clock. Ms. Wood had bumped into other people in that hallway, but had never bumped into anyone who fell down in the store. Mr. Lawery was "angry and said that I was threatening [him]" when she brushed into him. (TR at 184). On the sales floor, prior to the incident at the time clock, Ms. Wood was "mostly focused on getting [Mr. Lawery] not to raise [his] voice and to focus on the questions that I was asking [him]." *Id.* Mr. Lawery was talking about his hours and not having enough time to get his job done; everybody who worked in the store "said that at some point in time." *Id.*

Kroger Store 641 ranked number 1 in the district for sales, and probably in the top 20 for the bakery department in the division. Ms. Wood did not talk to Mr. Lawery directly about the incident on December 15, 2012. She did not conduct the investigation of Mr. Lawery, and at that time "other issues arose as far as [Mr. Lawery's] comments regarding the Connecticut issue, Connecticut situation, and at that point it was removed from my hands." (TR at 186). Ms. Wood did not hear those comments when they were made, but heard them from Ms. Harvell, who she described as "white as a sheet," and "very scared." (TR at 187). Ms. Wood then received directions from Mr. Huff to file a police report. Ms. Wood did not remember if Mr. Lawery's attendance was an issue, and could not recall any issue relating to his dress code or a customer complaint.

The shelf life of Hawaiian rolls is 14 days. Typically, the store would receive a distribution for holidays, in which the store is sent between one and four weeks supply of an item. Ms. Wood agreed that food should be properly dated, and that there is a connection between sell by dates and the safety of food. With regard to store productivity, Ms. Wood was expected to control wages and engage in best practices.

It was the decision of Mr. Huff, the HR coordinator, to issue Mr. Lawery's suspension, with which Ms. Wood agreed. Ms. Wood had no decision making authority, nor was she involved in preparing or sending the termination letter.

#### Redirect Examination

Ms. Wood was shown DX 15, a statement from Ms. Sanders dated February 18, 2013. Ms. Wood cannot recall whether she obtained similar information prior to that date, but she

contacted Ms. Sanders in February 2013 at the request of Mr. Huff. This was the first time Ms. Wood sought statements that related to the Hawaiian rolls incident.

The training of bakers is done in store by the employee running the bakery department. There was no procedure for bakers to be trained outside of the store.

### Recross Examination

Generally, if the store were to train an associate to be a baker, they would have the baker train the associate. If no baker was available, the associate could be sent to another store to train with that store's baker.

### **III. Lynne Harvell Testimony (TR at 198–211)**

#### Direct Examination

Ms. Harvell is currently a co-manager for Kroger at the Zebulon Road location. At the time of the hearing, she had been employed by Kroger for six and a half years. Ms. Harvell worked at Store 641 from the end of 2011 until approximately three months before the date of the hearing. DX 12 is the constructive advice record given to Mr. Lawery the day he was suspended. Prior to the day the record was given, Ms. Harvell had not been involved with any other constructive advice records for Mr. Lawery.

At the meeting, Ms. Wood read the constructive advice record and harassment policy to Mr. Lawery, and Mr. Lawery refused to sign the constructive advice record. Instead, Mr. Lawery asked to write a statement "as he felt he had been harassed by management, so we did give him the opportunity to do that." (TR at 199). Mr. Lawery completed his statement, and provided a copy to Ms. Harvell. After that, Ms. Harvell went to make a copy of either the constructive advice record or Mr. Lawery's statement. As she stood at the printer, Mr. Lawery approached her and stated "you need to make sure you do the right thing in this situation." (TR at 200). Ms. Harvell testified that she responded that the matter did not concern her and she was not involved, and that Mr. Lawery said "in fact, you are, in light of the shootings in Connecticut, you know that there's good and evil in the world, you need to make sure that you're on the good side." *Id.*

Ms. Harvell was "stunned" by what Mr. Lawery said because the Connecticut shootings had happened only a few days prior, and she "couldn't believe that he would reference that situation in the way that he did." (TR at 201). Ms. Harvell was shocked, and immediately reported what Mr. Lawery said to Ms. Wood. They called Mr. Huff and were advised to file a police report. DX 18 is the police report filed in connection with the incident. The police report was necessary because she wanted to document what Mr. Lawery had said; she felt uncomfortable, and although she did not feel threatened, she felt Mr. Lawery had threatened others in the store.

### Cross Examination

Ms. Harvell agreed that her testimony was close to verbatim of the statement in the police report. She did “not necessarily” feel threatened for herself, but agreed the police report stated that she felt threatened. Ms. Harvell was more concerned for the employees. Ms. Wood did not tell Ms. Harvell to call the police. Ms. Harvell cannot recall whether Mr. Lawery ever threatened her. When Mr. Lawery made the statement to her at the copier, she felt that he was threatening others.

The store would usually get a distribution around a holiday, and there would be more product in the freezers and on the sales floor. Mr. Lawery worked as a bakery clerk, and his responsibilities were to work the truck and bake bread and cookies. Ms. Harvell cannot recall whether any corrective actions were taken against Mr. Lawery prior to April 2012, and was only aware of corrective actions after that time when Mr. Lawery missed a bake order.

#### **IV. Darryl Huff Testimony (TR at 211–60)**

### Direct Examination

Mr. Huff is the human resource coordinator for Kroger District T, an area that encompasses approximately 20 to 21 stores. Mr. Huff has held the position for four years. He began working in Kroger in 1981, had a two year lapse, and returned to work in 2006. Mr. Huff began as an hourly associate, and worked as a co-manager, union manager, and produce coordinator before working in human resources.

In April 2012, Mr. Huff was the HR coordinator for the district, but did not receive an ethics complaint for Store 641. He received an ethics complaint in September 2012. Mr. Huff explained that the ethics inquiry system uses a 1-800 number that is posted in every store, and associates can call and talk about anything “they may feel uncomfortable with or might feel like something is wrong.” (TR at 213). Although Mr. Huff is unsure of how the system worked exactly, once the reporter gives information, it is sent to an administrator at the Division level, and then assigned to someone at the District level. Mr. Huff was assigned Mr. Lawery’s ethics complaint.

After receiving his assignment, Mr. Huff called Mr. Lawery and spoke with him, and also called Autumn Harbell and Ms. Wood. Mr. Huff wanted to get more background from these individuals, and asked Ms. Wood to pull Mr. Lawery’s timesheets so they could review his hours and whether they were reduced. In connection with his investigation, Mr. Huff found that Mr. Lawery alleged the wrong dates were put on products, and that in his conversation with Mr. Lawery, he “never alluded to the fact that it was extending dates.” (TR at 214). When he spoke with Ms. Harbell, she explained that Ms. Sanders told them to use to the date on the boxes in the display. Mr. Huff also reviewed Mr. Lawery’s hours from March through August, and that he worked 15 hour weeks twice during that time, but averaged 23 to 26 hours per week in that timeframe. Therefore, Mr. Huff could not substantiate Mr. Lawery’s claim that his hours were reduced.

It is Mr. Huff's understanding that in September 2012, the stores went from a manual to an e-schedule and associates would go onto a store website to enter their availability and special requests. The e-schedule system would then create a schedule for the associate, and that schedule would be approved by the department manager or store management. Mr. Huff explained to Mr. Lawery that his availability could impact the time he was scheduled, because someone with less seniority and more availability could fill the open spots on the schedule.

Once Mr. Huff reached his conclusions, he "posted a follow-up to the report," and asked the administrator to close the case. After Mr. Huff completed his investigation, he heard about Mr. Lawery via an email from Ms. Wood, informing him about an incident in the hallway between her and Mr. Lawery on October 31, 2012. Mr. Huff cannot recall whether he called Mr. Lawery or vice versa, but they spoke to one another several times. Mr. Lawery had Mr. Huff's cell phone number and was encouraged to call Mr. Huff at any time. When they spoke, Mr. Lawery was concerned about the incident, but never used the word "assault," and instead used the word "bump." (TR at 217-18). Mr. Huff contacted the loss prevention officer at the store to obtain a video, but there was no camera in the hallway.

Next, Ms. Wood contacted Mr. Huff after the incident between Mr. Lawery and Ms. Sweeney. Mr. Huff instructed Ms. Wood to send him all the information and documentation so they could review it. Mr. Huff always consults with a manager in these cases, and he had a discussion with his district manager about the incident. Both Mr. Huff and the district manager agreed that "with the allegation being so egregious," they should suspend Mr. Lawery. (TR at 219). After looking at DX11, Mr. Huff recalls that the egregiousness of Mr. Lawery's statements began with Mr. Lawery's statement that he "had dealt with Eula and Ms. Wood before, he wasn't afraid to do it again," and the reference to being from Florida and "doesn't take crap like this." *Id.* Mr. Lawery's reference to Ms. Sweeney as a "little white girl" was a violation of the harassment policy, as were the religious comments. *Id.* Some of Mr. Lawery's statements raised concerns about workplace violence. Mr. Huff cannot remember whether Mr. Ross and Ms. Washington's statements were taken before or after the decision to suspend.

Mr. Huff became aware of the statement made to Ms. Harvell after he received a phone call "just minutes after the conversation took place." (TR at 221). In response, Mr. Huff contacted the division loss prevention manager and consulted him, consulted his district manager, and a decision was made file a police report. Mr. Huff explained they did not decide to take out a warrant, but "wanted to get it on the record in case we had any future incidents." *Id.* The decision was made to place security in the store in light of Mr. Lawery's statements.

Mr. Huff was asked to be a part of the step two grievance after December 16, 2012. Step one was waived because they were concerned for Ms. Wood's safety, and a police officer was present at step two. Mr. Huff was present at the grievance proceeding; the grievance was denied. He was not a part of step three, and he believes that is where the operations coordinator and HR labor manager would have decided on the separation. Mr. Huff is not sure exactly who made the decision to terminate Mr. Lawery, but it was likely a decision made by HR in conjunction with loss prevention. The dating of the Hawaiian rolls had nothing to do with Mr. Lawery's termination. Mr. Huff believes the Hawaiian rolls incident was a miscommunication between

Ms. Sanders and Mr. Lawery, because the date was placed on the boxes at the time the cases were removed from the freezer, and that date was the date Mr. Lawery was asked to put on the individual packages. (TR at 223). Mr. Huff is not aware of any retaliation against Mr. Lawery because of his complaint about the Hawaiian rolls.

With respect to Mr. Lawery's claim of reduced hours, Mr. Huff only looked at the hours actually worked, and did not look at the hours he was scheduled to work. It is Mr. Huff's understanding that employees would enter their availability twice in a six-month period, and if an associate had a more urgent change to their schedule, they could work with a store manager for a manual adjustment. Mr. Huff testified that the fact Mr. Lawery filed an ethics complaint in August did not play a role in the decision to terminate him.

### Cross Examination

Mr. Huff is not sure when Mr. Lawery received his termination because he would not have been a part of the decision. He was present at a meeting with Shane Smith and Mr. Willow on step two, but was unsure if it was on January 9, 2013. The Georgia Department of Labor Separation Notice, DX 17, listed January 3, 2013 as the notice of termination. Mr. Huff did not handle the separation, the forms, or their mailing.

Mr. Huff, Chuck Wellborn, Shane Smith, and Mr. Lawery were all present at the step two meeting. Mr. Wellborn was the union shop steward, and Mr. Huff had worked with Mr. Wellborn before in a step two grievance. Typically, a step two grievance "gives an opportunity for the associate or former associate, depending on the timeline of separation to state their case, and for the Company to state their case, to the operations coordinator." (TR at 230). The operations coordinator then makes a "best judgment call" or refers the case to the labor manager. *Id.* Management cannot be members of the union, but any hourly associate can be a union member.

Mr. Huff spoke with Ms. Harvell after Mr. Lawery contacted EthicsPoint about the Hawaiian rolls. Mr. Huff understands that the harassment policy was discussed during the constructive advice record meeting on December 16, 2012, regarding Mr. Lawery's statements to Ms. Sweeney. CX 12, the EthicsPoint report was discussed briefly, and Mr. Huff noted it looked slightly different from DX1 but included follow-up information and case notes, and that was the difference in reporting.

After the investigation, Mr. Huff contacted Mr. Lawery by telephone to follow-up with him about the alleged reduction in hours. Mr. Huff told Mr. Lawery he could not substantiate the claim based on the information provided. It would be reasonable for an associate to forget they were called in to work five months prior. Both the Hawaiian rolls incident and Mr. Lawery's claim that his hours had been reduced were listed in the report.

Mr. Huff was hired by Kroger in March 1981, and had worked with Ms. Wood prior to the last three years. He characterized their relationship as co-workers. Mr. Huff worked for Ms. Wood as an hourly associate when she was an assistant manager for approximately one year, and as a co-manager when Ms. Wood was a store manager for a period of less than two years.

There is only one human resource coordinator for the district, which includes over 3,000 associates. Therefore, Mr. Huff did not speak to Ms. Sweeney directly, but instead gathered statements. As to the Connecticut shooting statement, although Mr. Huff agreed there was good and evil in the world, he would feel threatened if Mr. Lawery had said “you need to make sure that you are a part of the good” directly to him. (TR at 251). He feels terrible about the shootings in Connecticut, and he would characterize the shooting as evil. Although Mr. Huff was not present at the time the statement was made, he brought the matter to his supervisors as he was expected to do. Mr. Huff did not receive any reports that indicated Mr. Lawery committed a violent or physical act, but was aware of the situation that occurred on October 31, 2012. After that incident, Mr. Huff contacted Mr. Lawery by phone and informed him there was no video of the incident.

Mr. Huff cannot recall when he first met Mr. Lawery, but believes he met Mr. Lawery in Store 641 as he at one point had his office there. Notes to file were for a store manager’s reference because they have so many associates and could forget conversations or meetings.

In the email Ms. Wood sent Mr. Huff with regard to the October 31, 2012 incident, Ms. Wood noted Mr. Lawery was not stable. In Mr. Huff’s opinion, an individual who is unstable “does not act according to expectations,” and could be described as an individual who is “hollering, yelling, has a behavior that is threatening.” (TR at 255). If a Kroger employee is wrongfully terminated, that would be wrong. Putting the wrong date on a product would be considered wrong dating.

Mr. Huff thinks the step two grievance meeting took place on January 9, 2013. Mr. Lawery was terminated on January 3, 2013, and the grievance was related to the termination. The grievance process allows for the company to reinstate the associate during the suspension or after the termination. Mr. Huff was not a part of any investigation between December 16, 2012 and January 3, 2013.

## **V. Exhibits**

### *Letter to Courtney Lawery from Eula Fitzpatrick, January 18, 2012 (CX 1)*

Mr. Lawery provided a handwritten letter from Eula Fitzpatrick dated January 18, 2012. Ms. Fitzpatrick gave Mr. Lawery a list of tasks that needed to be completed that day, including working the truck and filling the sales floor with various products. Ms. Fitzpatrick noted that Mr. Lawery’s “help and input for this success is needed and appreciated, “and thanked him “for all you do.” (CX 1).

### *Report of Retaliation, September 17, 2012 and Management Response (DX 1)*

This report details the complaint made by Mr. Lawery with regard to an employee relations issue. Within the report section, Mr. Lawery reported Eula Fitzpatrick, Beth Wood, and Emma Sanders were the persons engaged in “unfair treatment related to scheduling.” (DX 1 at 1). The report indicates management was aware of the problem, and that the incident had been

ongoing since March 2012. Mr. Lawery reported that the unfair treatment began in March “when Ms. Sanders was making employees put the wrong expiration dates on perishable food.” *Id.* Mr. Lawery reported he brought the problem to the attention of management and refused to date the products incorrectly. He also reported that in retaliation, he “had his hours cut from 28-32 hours per week down to only 10-15 hours per week, but he was still expected to get the same amount of work done in less time.” *Id.*

Mr. Lawery also reported that he was threatened by Ms. Wood. He wrote “the loading, unloading and stocking work . . . takes more time than he is allotted,” and that Ms. Wood told him that if he “didn’t get all of his work done then he would get his hours cut more or be schedule for 0 hours.” *Id.* Mr. Lawery also reported being told that he “would be disciplined, including termination,” if he came to work late. *Id.* He claimed this was unfair, because Ms. Wood did not make similar statements to other employees.

In addition, Mr. Lawery noted that, at the time of the report, he had been unable to update his availability in the new online system and was schedule to work a shift for which he was unavailable. When he brought this to the attention of Ms. Fitzpatrick, Mr. Lawery reported being told that “if he did not work that shift he would be considered as having given up his job.” *Id.* at 2.

The management response to Mr. Lawery’s report included two notes. The first, dated September 10, 2012, was addressed to Mr. Lawery as a follow up to a phone conversation. The note indicates Mr. Lawery’s hours were pulled for March and April, and those hours averaged 26.5 hours per week, and did not go under 23.75 hours. The note also states that a follow up was completed with Management and Ms. Wood. A synopsis note was also added and signed by Mr. Huff. The note requests the report be closed as Mr. Huff was unable to substantiate Mr. Lawery’s claims. He reported “[t]he associate claimed a reduction in hours and that he is only working 10-15 hours per week. As of 8/25/2012; 5 of the last 6 weeks were 30 or more. 19 of the 26 were at 20 or more and only 2 of the 26 weeks were less than 15. He has very limited availability.” *Id.*

Summary Report of Mr. Lawery’s Hours (DX 2)

A summary and detailed report of Mr. Lawery’s hours from January 2012 through February 2013 was submitted by the Respondent. The summary sheet shows the hours worked per week, and the detailed report includes hourly codes and pay amounts. The summary sheet reports the following sum of hours worked each week:

Week Earned	Total Hours
02/04/2012	29
02/11/2012	25.75
02/18/2012	32
02/25/2012	35.25
03/03/2012	27
03/10/2012	27.75
03/17/2012	27
03/24/2012	31.25
03/31/2012	23.75
04/07/2012	23.75

04/14/2012	24.25
04/21/2012	24.25
04/28/2012	29.25
05/05/2012	25.25
05/12/2012	19.5
05/19/2012	19.25
05/26/2012	23.25
06/02/2012	26.25
06/09/2012	15.5
06/16/2012	21
06/23/2012	16.75
06/30/2012	28
07/07/2012	16
07/14/2012	15
07/21/2012	32
07/28/2012	30
08/04/2012	31.75
08/11/2012	30.25
08/18/2012	30.75
08/25/2012	25.75
09/01/2012	15.5
09/08/2012	13.25
09/15/2012	18.25
09/22/2012	12
09/29/2012	18
10/06/2012	18
10/13/2012	23.5
10/20/2012	26.25
10/27/2012	22
11/03/2012	21.75
11/10/2012	25.25
11/17/2012	26
11/24/2012	26.75
12/01/2012	16.75
12/08/2012	25.75
12/15/2012	24.5
12/22/2012	2.5

Availability Form for Mr. Lawery, April 28, 2012 (DX 3)

Mr. Lawery completed an availability form on April 28, 2012 that indicated he was available to work on Sunday between 12:00 a.m. to 6:00 a.m. and 2:00 p.m. to 11:59 p.m.; Monday and Tuesday anytime; Wednesday and Thursday between 9:00 p.m. and 6:00 a.m.; Friday between 12:00 a.m. and 7:00 p.m.; and Saturday between 8:00 p.m. and 11:59 p.m.

Constructive Advice Record, April 28, 2012 (DX 4)

A constructive advice record dated April 28, 2012 reported that Mr. Lawery failed to follow instructions. The record is unsigned by Mr. Lawery and store management, and there is a

note across the employee statement section that states “NTF, B.Wood, G. Mayhue, E. Fitzpatrick.” (DX 4). The incident described in the explanation section and accompanying note indicate that Mr. Lawery did not prepare a bread order for a customer, and a \$50.00 gift card had to be given to satisfy that customer. The corrective effort note reported Mr. Lawery would take care of customers “properly to ensure that they are satisfied,” and that “failure to do so will result in disciplinary actions up to and including discharge.” *Id.* It was also noted that Mr. Lawery had been warned previously for similar occurrences.

*Note to File/Statement from Michelle Vickers, April 28, 2012 (DX 5)*

Michelle Vickers provided a typed and signed letter that described her interaction with Mr. Lawery on April 28, 2012. At approximately 6:00 a.m., Ms. Vickers found Mr. Lawery on the sales floor videoing, and she asked him why he was engaged in that activity. Mr. Lawery told Ms. Vickers that he wanted to show his wife what he did at work, and then stated that “he had to do what he had to do.” (DX 5). Ms. Vickers informed Mr. Lawery this was against company policy, and he requested to speak to her in her office.

Ms. Vickers reported that Mr. Lawery sat with her in her office and asked questions, and that he frequently interrupted her and would not give her the opportunity to talk. She stated that this conversation was witnessed by Ginger. Mr. Lawery complained about the number of pallets that were ordered and stated that it was too much for one person. When asked who should have worked, Mr. Lawery responded that Lucy Sanders should have worked on her day off. Ms. Vickers explained why this was not possible, and Mr. Lawery stated that he “tries to keep Lucy out of trouble.” *Id.* Ms. Vickers also explained that it was the expectation of his job to get all of the product out and worked into the freezer. She reported that Mr. Lawery attempted to record the meeting with his phone, and was told it was not allowed. At the end of the meeting, Mr. Lawery stated that he understood he was not to record, video, or take pictures without management approval, and that he was not “to bring any refrigerated or frozen product to the sales floor that was going back into refrigeration or the freezer that he could not work in around 30 minutes for proper cold chain management.” *Id.* She noted that Mr. Lawery had “8 pallets of frozen on the sales floor in bakery when I came in this morning.” *Id.*

*Kroger’s Start Statement and YouTube Video (CX 9)*

A statement was submitted into evidence that explained Kroger stores began in 1883 in Cincinnati, and the founder, Bernard Kroger, had a saying “be particular. Never sell anything you would not want yourself.” (CX 9). This document did not state from where this information came.

The statement also included a YouTube link. At the hearing, I asked the Claimant and Counsel for the Employer to provide a written statement as to the relevancy of the video itself within two weeks. No statements were provided. A review of the YouTube video shows a 1 minute and 57 second video of what appears to be the inside of the Kroger store where Mr. Lawery worked. Mr. Lawery stated at the hearing that he took the video with the purpose of showing “the practices that were in place the whole time I was working there.” (TR at 21–22).

The video depicts a large number of boxes on the sales floor of the grocery store, and more boxes inside what may be a refrigerator or freezer.

Note to File, October 31, 2012 (DX 6)

Ms. Wood sent an email to Mr. Huff dated October 31, 2012, and marked the email as a note to file. Ms. Wood reported that Mr. Lawery called Mr. Huff because Ms. Wood had “asked him to stop yelling at me on the sales floor.” (DX 6). Ms. Wood had asked Mr. Lawery to call her before he finished his shift so she could “walk the truck with him,” and when she “pointed out something that was not done; he went off.” *Id.* Mr. Lawery was asked repeatedly to lower his voice, and Ms. Wood told him that he would be suspended for gross insubordination if he continued to raise his voice at her.

Mr. Lawery stated that he needed more time when he was asked to complete his tasks in the time allotted, that Ms. Wood had asked him to stay late, and that “he did not want more hours.” Ms. Wood did not ask Mr. Lawery to stay late. Mr. Lawery “continually deflected the feedback.” Mr. Lawery told Ms. Wood that she had threatened him when he clocked out. She reported that Mr. Lawery “is not stable and the next time he raises his voice I will call the police and have him removed from the store as his behavior is threatening.” *Id.* Mr. Lawery requested they go upstairs so she “would not be embarrassed on the sales floor.”

Constructive Advice Record, December 15, 2012 (DX 7)

A constructive advice record dated December 15, 2012 was issued for Mr. Lawery’s failure to follow instructions. It was signed by store management, and union representative Ginger Mayhue was informed of the details. The form indicates Mr. Lawery refused to sign the record. The exhibit reports that Mr. Lawery was “not working the truck properly. He is pushing it in the freezer and leaving it on the float, when most of it will go out on the sales floor.” (DX 7). The corrective effort note states that Mr. Lawery “will work the entire frozen truck as he is instructed by management to do. Failure to do so will require further disciplinary action up to and including termination.” *Id.* The form also indicates Mr. Lawery had been verbally warned previously for a similar occurrence.

Mr. Lawery’s Statement, December 15, 2012 (DX 8)

Mr. Lawery provided a written statement on December 15, 2012, after he refused to sign the constructive advice record with the same date. He refused to sign because the report was incorrect and untrue. The statement provides, “I have properly worked the truck and ask that the video verifying this be reviewed.” (DX 8). Mr. Lawery also wrote that he believed he was being “unfairly targeted” by management. *Id.*

Proposed Constructive Advice Record, December 16, 2012 (DX 9)

An unsigned constructive advice record dated December 16, 2012, provides that Mr. Lawery failed to follow instructions. According to the explanation, Mr. Lawery was instructed to

bake cookies and was scheduled to work from 8:00 p.m. until 12:00 a.m.<sup>5</sup> When the baker arrived in the morning, the cookies were “still behind the counter.” (DX 9).

Statement from Nate Godbee, December 16, 2012 (DX 10)

A brief written statement was provided by Nate Godbee, and was dated December 16, 2012. He reported that he “walked by and saw Courtney and Alicia arguing. I asked what was wrong and Courtney said nothing and walked off and Alicia said she was upset. So then I left.” (DX 10).

Statement from Alicia Sweeney, December 16, 2012 (DX 11)

Ms. Sweeney provided a written statement dated December 16, 2012 that reported the incident that occurred on December 15, 2012. Ms. Sweeney explained that on that evening, Jonnie had left Mr. Lawery a list of tasks which included baking cookies and putting the doughnuts in pans. When Mr. Lawery came to work, Ms. Sweeney told him that she “had done the floats in the cooler and all he had to worry about was that list,” and that the store had been very busy. (DX 11 at 1). After Ms. Sweeney returned from her break, she reported that Mr. Lawery “went off on me,” and said that Ms. Sweeney was “talking ‘crap’ about him behind his back to Jonnie.” *Id.* According to Ms. Sweeney, Mr. Lawery alleged that she and Jonnie were friends and that they “must be talking crap about him behind his back,” and that he gets his work done “and the camera can prove it.” *Id.* Ms. Sweeney responded that she had only spoken about Mr. Lawery when asked by Ms. Wood who had worked the night before. Mr. Lawery then stated that “he has dealt with Eula and Ms. Wood before and isn’t afraid to do it again, and that the cameras will show that he does his job.” *Id.*

Ms. Sweeney reported that Mr. Lawery told her that he could not “be real” with her because she is “fake and just talk ‘crap’ behind his back.” *Id.* at 2. Mr. Lawery then told Ms. Sweeney that he needed the job because of his family and responsibilities and that “finding a job for him with a beard would be hard and he doesn’t need for me to be running my mouth about him getting in trouble or fired.” *Id.* Mr. Lawery also told Ms. Sweeney that she was “a pretty white girl that anyone would hire.” *Id.* The conversation continued, and Ms. Sweeney stated that she tried to explain she had responsibilities and needed her job as well. Ms. Sweeney reported that the conversation continued, with Mr. Lawery declaring that he was from Florida and “doesn’t put up with crap like this,” and that where he is from, “we don’t take crap like that.” *Id.* Mr. Lawery also told Ms. Sweeney that he overheard her tell Nate that his job was easy.

Ms. Sweeney reported that after the interaction, Mr. Lawery was called to the office and was gone for approximately 45 minutes. During that time she stated that Nate came to the bakery to check on her because she was visibly upset. When Mr. Lawery returned, Ms. Sweeney told him that she had not said anything bad about him, and apologized if she had said something offensive, but “that was not the way to handle it.” *Id.* at 3. Ms. Sweeney reported that Mr. Lawery continued to complain about people talking behind his back, and that what they said “will come into the light” because the “cameras will show that he is right.” *Id.* Mr. Lawery

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<sup>5</sup> The report states Mr. Lawery was scheduled “8pm to 12p.” Based on Mr. Lawery’s schedule and the remainder of the report, I find that this is a scrivener’s error and should be 12:00 a.m.

“continued to say that he was Christian,” and asked if Ms. Sweeney was Christian. *Id.* After she told him she was, Mr. Lawery stated “I know Jonnie is not and it will bring you down, you need to watch who you hang around.” *Id.*

Ms. Sweeney again told Mr. Lawery that the only time she had talked about him was during a meeting called by Ms. Wood about the floats in the freezer. Mr. Lawery responded by stating “you better tell Ms. Wood and Jonnie that they got something coming for them because I’m not dealing with this.” When Ms. Sweeney told him she would tell them what he said, he encouraged her to do so. He also stated that if his tasks were not complete in the morning, it was due to the fact he had been in the office for 45 minutes. Ms. Sweeney reported that Mr. Lawery told her again that she should not associate with Jonnie because “she’s atheist and that will only bring you down.” *Id.* at 4. Ms. Sweeney told Mr. Lawery that she believed there were good Christians and atheists, but Mr. Lawery told her “no. She’s going to hell cause she doesn’t believe.” *Id.* Ms. Sweeney then told Mr. Lawery that she had done the dishes and doughnuts, and that all he had to do was get the cookies and pan the doughnuts. After that point, she left for the night. Ms. Sweeney characterized the evening as a “horrible night.” *Id.* at 5.

Constructive Advice Record, December 16, 2012 (DX 12)

A constructive advice record dated December 16, 2012, was issued for Mr. Lawery’s disregard of established rules and regulations. The form was signed by Ms. Wood, Ms. Harvell, and Mr. Meredith, and witnessed by Courtney Ross. Mr. Lawery refused to sign. Ginger Mayhue the union representative was not present, but was informed on December 17, 2012 of the details of the incident. The record provided the explanation that Mr. Lawery “has made offensive remarks regarding other associates beliefs; he has also made statements of pay back towards certain individuals in the store.” (DX 12). The form noted the employee had been warned previously for a similar occurrence when he “signed rules & regs.” *Id.* The record also indicated Mr. Lawery was suspended pending an investigation for the violation of store rules and regulations.

Attached to DX 12 was the harassment policy read or provided to Mr. Lawery during the constructive advice record meeting. In pertinent part, the policy prohibits harassment because of an individual’s “race, color, religion, gender, national origin, age, disability, or sexual orientation.” *Id.* at 2. Harassment is defined by the policy as:

Verbal or physical conduct that (1) denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, disability or sexual orientation or that of the individual’s relatives, friends or associates, and (2) has the purpose or effect of creating an offensive work environment, unreasonably interferes with an individual’s work performance, or otherwise adversely affects an individual’s work performance.

*Id.* at 3.

Statement in Response to Constructive Advice Record, December 16, 2012 (CX 11)

As Mr. Lawery refused to sign the constructive advice record dated December 16, 2012, he provided a written statement on the same day. Mr. Lawery wrote that he was “the individual who has been harassed continually since late March 2012.” (CX 11). He noted that he was unfairly treated by Ms. Wood, who had also aggressively bumped him in front of the time clock on October 31, 2012. Mr. Lawery requested that any video be reviewed to show the incident. In addition, Mr. Lawery stated he had been treated unfairly by management after he filed a complaint, and that he believed “some in high levels of store management” wished to have him terminated. *Id.* Mr. Lawery also wrote that the charges against him were false.

Statement from Debra Washington, December 16, 2012 (DX 13)

On December 16, 2012, Ms. Washington provided a written statement that described the interaction she had with Mr. Lawery on the same day. Ms. Washington was approached by Mr. Lawery while she was on the sales floor, and she agreed to speak with him after she helped some customers. During their conversation, Mr. Lawery showed Ms. Washington his constructive advice record and told her that he heard he had offended her and wanted to apologize. Ms. Washington stated that Mr. Lawery told her “the people in this store are not right and that bad things will happen when you don’t do write (sic).” (DX 13). Ms. Washington did not remember any incident in which Mr. Lawery offended her, and when he apologized again, she told him she was sorry he received a constructive advice record. She also noted he quoted a scripture to her.

Statement from Courtney Ross, December 16, 2012 (DX 14)

Mr. Ross provided a written statement after he sat in the constructive advice record meeting with Mr. Lawery on December 16, 2012. Mr. Ross stated that “during the conversation, Courtney made several statements regarding how he addressed fellow associates such as ‘what goes around comes around’ and ‘you reap what you sow.’” (DX 14).

Police Incident Report, December 16, 2012 (DX 18)

An incident/investigation report was completed by Officer James M. Roberson on December 16, 2012 at the Warner Robins Police Department after he received a phone call from Ms. Harvell. Officer Roberson’s report indicates Ms. Harvell called after finishing a disciplinary incident with Mr. Lawery, and Mr. Lawery made statements to her at the copy machine. Ms. Harvell informed Officer Roberson that Mr. Lawery stated “make sure that you are on the right side of this situation,” and when she responded “it does not concern me,” he replied with “in fact it does.” (DX 18 at 2). Ms. Harvell also told the Officer that Mr. Lawery stated “in light of the shooting in Connecticut we know that there is good and evil in the world and you need to make sure that you’re a part of the good.” *Id.* Ms. Harvell reported feeling threatened and that she was “concerned about the safety of herself and her employees.” *Id.* She also stated that she wanted to document the incident, and explained why Mr. Lawery had been in a disciplinary hearing. Officer Roberson advised Ms. Harvell of the case number and instructed her on how to obtain a copy of the report and secure a warrant. No further action was taken by Officer Roberson.

Notice of Suspension Pending and Separation Notice, January 3, 2013 (DX 16, DX 17)

A letter dated January 3, 2013 was sent to Mr. Lawery by Rebecca Clark, Assistant Human Resources Manager for the Atlanta Marketing Area. The letter informed Mr. Lawery that his employment with Kroger Store 641 was terminated as a result of his December 16, 2012 suspension pending further investigation because of his “activity involving violation of store rules.” (DX 16).

A separation notice, signed by Rebecca Clark, Assistant Human Resources Manager, was also completed January 3, 2013. Mr. Lawery was separated from employment for a violation of store rules.

Statement from Emma L. Sanders, February 18, 2013 (DX 15)

Ms. Sanders sent an email to Mr. Huff on February 18, 2013 on the subject of Hawaiian rolls. Ms. Sanders and Eula had built a large display of the Hawaiian rolls, and she had pulled off all of the packages of rolls to replenish the display. When Ms. Sanders put the new rolls in the display, she dated the box on the back side. Mr. Lawery put new rolls in this display a few days later, and Ms. Sanders told him “the date was on the back of the box since he was taking some of them out of the box.” (DX 15). Mr. Lawery refused to put that date on the rolls, and said Ms. Sanders “was extending the date.” *Id.* Ms. Sanders explained to Mr. Lawery that she was not putting new dates on the rolls, to which he responded that “he felt like it was.” *Id.*

Letter to the Georgia Department of Labor from TALX, January 29, 2013 (CX 8)

A letter dated January 29, 2013 was sent from Unemployment State Consultant Anna Palasciano with TALX to the Georgia Department of Labor. TALX UC eXpress served as the agent of the Employer, and appealed the determination of the Claims Examiner dated January 14, 2013, which granted unemployment benefits to Mr. Lawery. The Employer appealed the determination because Mr. Lawery “acted in a manner that she (sic) knew or reasonably should have known would jeopardize her (sic) employment. Benefits should be denied as the claimant had the ability to control the situation and preserve her (sic) employment.” (CX 8). The letter informed the Georgia Department of Labor that Ms. Wood would participate in the hearing.

Store Rules and Regulations (DX 19, 20)

Mr. Lawery signed an acknowledgement on April 13, 2011 that he read and understood the Kroger Rules and Regulations. In pertinent part, the Store Rules and Regulations cover general conduct, including the policy on harassment, rules on time and attendance, and store safety rules, including deli/bakery safety rules.

Molds on Food Document (CX 10)

A seven page print out from the usda.gov website was submitted into evidence entitled “Molds on Food: Are They Dangerous?” The document explains what molds on food are, and

provides guidelines on how to handle food with mold. In addition, the document explains the dangers of mold, and which molds are safe.

## **FINDINGS OF FACT**

In finding the facts of this case, I have considered all the relevant testimony and exhibits admitted into evidence. With respect to the credibility of the witnesses, I evaluated their demeanor and testimony at the hearing, and compared it when applicable to the documentary evidence. I find that Mr. Lawery was in general a credible witness, in the sense that he sincerely believed that his version of events was true, and testified consistently; however, to the extent that his testimony conflicted with that of the other witnesses in this case, I find that his sincere belief was misplaced. In particular, with regard to the events that occurred immediately before his suspension and eventual termination, I credit the testimony of the other witnesses and the contemporaneous documentary evidence. Although Mr. Lawery made some admissions about those events, he tended to minimize his statements and his conduct, and insisted that they were taken out of context. The other evidence shows that his statements regarding others' religious beliefs and with respect to the recent Connecticut school shootings were of great concern to his listeners, who made immediate reports that resulted in immediate action. In addition, I find that Ms. Wood, Ms. Harvell, and Mr. Huff were all credible witnesses, whose testimony was internally consistent and consistent with that of the others, and also matched the documentary evidence. Based on the record before, and after due deliberation on all relevant evidence, I make the following findings of fact.

Mr. Lawery was hired by The Kroger Company, Store #641 on April 13, 2011 as a part-time bakery clerk. His duties included baking bread and cookies, unloading delivery trucks into the bakery freezer, and distributing items onto the sales floor. After January 2012, Mr. Lawery was only available to work the night shift. Prior to March or April of 2012, Mr. Lawery had no disciplinary action, and had one conversation with a supervisor, Ms. Wood, about tardiness.

In late March or early April of 2012, Mr. Lawery refused to follow the instructions of Ms. Sanders, a supervisor, to date Hawaiian rolls with a specific date. The record is unclear whether Mr. Lawery was asked to improperly extend the shelf life of this product, or whether there was a misunderstanding as to the correct date that should have been placed on the product. Nonetheless, Mr. Lawery reported his concerns about food safety to his supervisor, Ms. Sanders. I find, based on his uncontested and credible testimony, that Mr. Lawery had an actual belief that he had been instructed to place an improper expiration date on the rolls.

On or about April 28, 2012, Mr. Lawery failed to prepare a bread order for a customer, and received a warning. The same day, Mr. Lawery was found videoing on the sales floor, and was stopped by Ms. Vickers. He was given another verbal warning and a note was placed in his file. Mr. Lawery was instructed not to video on the floor, and was instructed on proper cold chain management and the duties and expectations of his job.

In late August, Mr. Lawery filed a complaint with EthicsPoint, a third-party used by Respondent for employees to contact if they have a concern. Mr. Lawery reported he had been

treated unfairly since he raised concerns over the dating of products in April 2012, and alleged a reduction in hours. Mr. Huff, the human resources coordinator for Respondent, investigated the matter and found no reduction in hours following the April 2012 incident. Therefore, Mr. Huff closed the complaint because he was unable to substantiate Mr. Lawery's claims.

On October 31, 2012, Mr. Lawery had an interaction with his supervisor, Ms. Wood. The testimony of both Mr. Lawery and Ms. Wood, along with a note to file written by Ms. Wood on the same day, indicates that Mr. Lawery became very upset as he believed he was asked to stay late to fix a product display, and he did not feel he could finish his tasks in the time allotted. When Mr. Lawery clocked out at the end of his shift, he and Ms. Wood bumped into one another, and Mr. Lawery told Ms. Wood she had threatened or assaulted him. I find that Ms. Wood did not intentionally bump into Mr. Lawery, but that she accidentally bumped him as she was passing behind him in a narrow hallway. I make this finding based on my assessment of the credibility of the only two witnesses to the incident. Mr. Lawery was, by October 31, 2012, a discontented employee who was concerned about video surveillance, and who was convinced that his managers were opposed to his interests. As a result, he exaggerated the incident in the hallway in his own mind to the level of an intentional assault. To the contrary, Ms. Wood testified credibly that the event was a minor one until Mr. Lawery accused her of assaulting him, at which time she reported it to Mr. Huff. Further, the conclusion that the incident involved a minor bump, and not an intentional assault, is buttressed by the testimony of Mr. Huff, who testified credibly that when Mr. Lawery spoke to him about the incident, he referred to it as a "bump" and not as an assault.

In mid-December, Ms. Wood was informed by other Kroger employees that Mr. Lawery had worked the truck the night before, after Ms. Wood discovered the delivery truck had not been unloaded properly. Mr. Lawery met with a supervisor and was given a constructive advice record on December 15, 2012, which Mr. Lawery refused to sign. Mr. Lawery then confronted another employee, Alicia Sweeney and asked whether she was talking about him. The situation escalated, and the testimony of Mr. Lawery and the statement made by Ms. Sweeney differ as to the substance of the statements made by Mr. Lawery. Ms. Sweeney alleged Mr. Lawery made comments that he "has dealt with Eula and Ms. Wood before and isn't afraid to do it again, and that the cameras will show that he does his job," that he knew Ms. Sweeney was "talking crap about him," that Ms. Sweeney could get any job because she was a "pretty white girl," and that she should not associate with another coworker, Jonnie, because she was not a Christian and would go to hell. (DX 1 at 1-4). Mr. Lawery denied that he made such comments. I find that Mr. Lawery did make the comments as described by Ms. Sweeney. There was independent evidence that Mr. Lawery's comments were upsetting to Ms. Sweeney, and based on his demeanor during his testimony on this issue, his denial was not credible. Mr. Lawery's reference to "cameras" was consistent with his belief that he was under almost constant surveillance while working at Kroger. Furthermore, in his written statement made the next day after a constructive advice record meeting regarding these comments, he admitted making statements that were similar to those reported by Ms. Sweeney, although he again minimized their meaning and contended that they were taken out of context. His admission that he made comments similar to those reported by Ms. Sweeney, Ms. Sweeney's statement, the independent evidence that Ms. Sweeney was upset by the conversation with Mr. Lawery, and Mr. Lawery's less-than-credible denial, all persuade me that he did make the statements as reported.

On December 16, 2012, Mr. Lawery was present at a constructive advice record meeting with Mr. Ross, Ms. Harvell, Ms. Wood, and Mr. Meredith. The purpose of the meeting was to address the alleged remarks Mr. Lawery made to Ms. Sweeney, to review the store's harassment policy, and to inform Mr. Lawery he was suspended pending an investigation. Mr. Lawery denied the charges and refused to sign the constructive advice record. After the meeting, Mr. Lawery spoke to Mr. Ross and Ms. Harvell. Mr. Ross reported that Mr. Lawery made statements such as "what goes around comes around" and "you reap what you sow." (DX 14). Mr. Lawery denied making these statements. I find that he did. Mr. Lawery was upset about the accusations, and the statements attributed to him by Mr. Ross are consistent with what one would say under the circumstances, and are consistent with Mr. Lawery's reaction to accusations in general. Further, Mr. Ross had no reason to make up the statements. When he spoke to Ms. Harvell, Mr. Lawery told her that she needed to tell the truth, and made a statement about the recent school shooting in Connecticut, and told her that there was "good and evil" in the world. (TR at 123, 200). Ms. Harvell felt Mr. Lawery's statements were a threat, and became concerned about the safety of the store employees. Ms. Wood and Ms. Harvell consulted Mr. Huff and then filed a police report the same day. Mr. Lawery admitted referring to the Connecticut school shooting when he spoke with Ms. Harvell, but said that she misunderstood his reference. Resolving the conflict, I note that Mr. Lawery admitted referring to the Connecticut school shootings. The school shooting had occurred only two days earlier than the constructive advice meeting, and were clearly fresh in both Mr. Lawery's and Ms. Harvell's memories.<sup>6</sup> Ms. Harvell testified credibly about what Mr. Lawery said, while Mr. Lawery, consistent with his practice, minimized his statement. Ms. Wood testified credibly that Ms. Harvell was "very shaken" by Mr. Lawery's statements. Accordingly, I find that Mr. Lawery did make the statements as described by Ms. Harvell.

When Ms. Harvell reported Mr. Lawery's statements to Ms. Wood, Ms. Wood immediately contacted Mr. Huff, who recommended immediate suspension, a police report, and additional security in the store. Mr. Lawery was suspended pending investigation.

Mr. Lawery filed a union grievance after his suspension. On January 3, 2013, Mr. Lawery was informed he was terminated as a result of the activities that led to his suspension. The grievance was ultimately denied and his termination was upheld and became final.

## CONCLUSIONS OF LAW

In 2011, Congress amended the FDCA, 21 U.S.C. § 1021, through passage of the FSMA, a bill designed to comprehensively reform the food safety laws. *See* Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified as amended at 21 U.S.C. § 301 *et seq.*). In pertinent part, the FSMA offers protections for whistleblowers in the food industry. The relevant provision of the FSMA in this case provides:

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<sup>6</sup> The shooting at Sandy Hook Elementary School in Newtown, Connecticut, in which 20 students and 6 teachers were killed, took place on December 14, 2012, and the constructive advice meeting took place on December 16.

No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food 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 the 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 chapter or any order, rule, regulation, standard, or ban under this chapter, or any order, rule, regulation, standard, or ban under this chapter;
- (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 order, rule, regulation, standard, or ban under this chapter.

21 U.S.C. § 399d. The authority to implement the whistleblower protections of the Act lies with the Secretary of Labor. *See* 29 C.F.R. §§ 1987.101 - .102.

In a cause of action for retaliation under the FSMA, the complainant must establish, by a preponderance of the evidence that (1) they engaged in a protected activity; (2) they suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action. *See* 29 C.F.R. § 1987.109. If the complainant satisfies this burden, the respondent may prohibit the order of relief if it can demonstrate by clear and convincing evidence that it would have taken “the same adverse action in the absence of any protected activity.” *Id.* Generally, in whistleblower regulations, a “contributing factor” is a factor that tends to affect in any way the outcome of a decision. *See Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (D.C. Cir. 1993).

## **I. Coverage Under the Act**

Complainant and Respondent did not stipulate as to whether they are covered by the FSMA. The evidence indicates Complainant and Respondent had an employee-employer relationship.<sup>7</sup> Therefore, the only question that remains before the merits of this claim are

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<sup>7</sup> The Complainant was an employee of The Kroger Company, Store 641 at all relevant times. *See e.g.*, DX 2 (hours worked by the Complainant at the Respondent's store); DX 19 (store rules and regulations signed by the Complainant); DX 4, 7, 8, 9, 12 (constructive advice records issued to Complainant by store management); DX 16–17 (notices of suspension pending investigation and termination).

addressed is whether Respondent is an entity as defined under the Act. 21 U.S.C. § 399d states that a covered entity is one “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food.”

Although the Act and accompanying Department of Labor Regulations do not define the terms used to describe a covered entity, the FDCA’s regulations provide some insight. For example, holding is defined as the “storage of food;” manufacturing is defined as “making food from one or more ingredients . . . examples of manufacturing/processing activities are cutting, peeling, trimming, washing, waxing, eviscerating, rendering, cooking, baking, freezing, cooling, pasteurizing, homogenizing, mixing, formulating, bottling, milling, grinding, extracting juice, distilling, labeling, or packaging;” packing is defined as “placing food into a container other than packaging the food.” 21 C.F.R. § 1.227. Furthermore, the FDCA’s regulations define a retail food establishment as “an establishment that sells food products directly to consumers as its primary function. A retail food establishment may manufacture/process, pack, or hold food if the establishment's primary function is to sell from that establishment food, including food that it manufactures/processes, packs, or holds, directly to consumers,” and notes grocery stores are retail food establishments. *Id.*

Respondent is a covered entity under the Act. In this case, the Complainant and other employees of Kroger worked in activities related to the preparation and sale of food to the customers of Respondent. The evidence and credible testimony by the Complainant demonstrate that Respondent engaged in the manufacturing of food, as Complainant was asked to bake and package various items for sale in the store.<sup>8</sup> Furthermore, the evidence and testimony also demonstrates the Complainant and his colleagues spent time unloading trucks into a freezer, and then taking food from the freezer to the sales floor.<sup>9</sup> This satisfies the definition of holding. The FDCA regulations also include grocery stores as “retail food establishments” that may manufacture/process, pack, or hold food. Accordingly, Respondent is a covered entity under 21 U.S.C. § 399d based on the evidence in the record and the definitions contained within the regulations that accompany the FDCA.

## **II. Complainant Engaged in Protected Activity**

In this case, Mr. Lawery did not identify a specific part of the Act or Regulations, or any other law, rule, or regulation that Respondent violated. Mr. Lawery alleged that he was instructed to put the wrong expiration date on packages of Hawaiian rolls, and that he reported this practice to management. The Act provides that an employee engaged in protected activity if “they provided, caused to be provided, or is about to provide or cause to be provided to the employer . . . information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any order, rule, regulation, standard, or ban under this chapter,” or if they “objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to

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<sup>8</sup> See DX 4 (the Complainant was asked to bake rolls for a bread order); DX 9 (constructive advice record indicating the Complainant baked cookies to be sold); DX 11 (Ms. Sweeney indicated the Complainant’s job included baking cookies).

<sup>9</sup> See CX 1 (showing the Complainant was responsible for unloading the truck and filling the sales floor); DX 5 (discussing freezer and refrigeration of the food); DX 7 (discussing the Complainant’s duties unloading the truck).

be in violation of any provision of this chapter, or any order, rule, regulation, standard, or ban under this chapter.” 21 U.S.C. § 399d(a). Therefore, there is no requirement that the Complainant allege a violation of any particular section of the law, but he must demonstrate that he reasonably believed the activity was a violation of the FSMA.

There is little evidence as to how Mr. Lawery reached a conclusion that the act of dating the Hawaiian rolls violated the FSMA. He testified that during the Easter holiday, the store received a larger shipment, and there was no room in the freezers for the Hawaiian rolls. Therefore, the rolls were placed in the hallway. Mr. Lawery explained that the manufacturer of the rolls gave the product 14 days to thaw, or 14 days of shelf life. During the incident, Mr. Lawery testified he was asked to put a date 14 days in the future on the packages of rolls, but he knew the rolls had been in the hallway for 5 days unrefrigerated. Thus, he was concerned the rolls would be available for sale 5 days past their expiration date. Furthermore, Mr. Lawery testified that he was worried a customer would get food poisoning.

The Complainant also testified that other employees and his supervisor had a habit of putting the wrong dates on items, and was told by one employee in particular that she added extra days on a certain product. Thus, he testified that in September 2012, he realized that improper dating “might not have been an accident,” and he reported the problem to EthicsPoint, along with his complaint that his hours were reduced after the initial reporting of the improper dating of the Hawaiian rolls in April 2012. Although there was no testimony or evidence as to whether the alleged improper dating of the rolls violated the FSMA, the evidence shows the Complainant manifested a concern about food safety and foodborne illness on two separate occasions.

In response, the Respondent has attempted to demonstrate that the Complainant did not have a reasonable belief this activity was unlawful, but that it was a miscommunication between employee and supervisor. Ms. Wood testified at the hearing that the expiration date on the packages of rolls would have matched the expiration date on the display case, and that Mr. Lawery had not been instructed to put an incorrect date on the packages. She testified that Mr. Lawery’s complaint later in the year was “a non-issue” because “that was just our standard operating procedure” with regard to the handling of Hawaiian rolls.” (TR at 136). Ms. Sanders provided a written statement that corroborated Ms. Wood’s statement with regard to the date on the display matching the date on the package. Ms. Sanders also wrote that she explained to Mr. Lawery that she did not request an extension in the date, but Mr. Lawery responded that “he felt like it was.” (DX 15).

I find that the Complainant reasonably believed he was asked to engage in a task, namely dating the Hawaiian rolls, which violated the FSMA. When he believed that other improper dating or extension of shelf-life related activities had continued he made a report to EthicsPoint that provided information about a possible violation to the employer. There is no requirement in the Act that a complainant specify which provision of the law has been violated. The Respondent has offered little evidence to show the Complainant’s belief was unreasonable.

While the Complainant and his colleagues may have misunderstood one another, the Complainant testified credibly that he believed the rolls were left in the hallway for 5 days, and

that he was asked to date them improperly. Mr. Lawery testified that Ms. Sanders asked him to engage in the improper dating of the rolls. He explained that he knew the rolls were put in the hallway because of a large distribution at least five days before the date of the incident. At the time, Ms. Sanders was the bakery manager. Mr. Lawery testified Ms. Sanders asked him to get the rolls that had been in the hallway and date them, and provided him with an incorrect date. Mr. Lawery stated the date was wrong because it did not take into account the five days that the rolls had been out of the freezer. When Ms. Sanders instructed him to set the date as “14 days from today,” Mr. Lawery refused. (TR at 87). Ms. Sanders told Mr. Lawery he had to date the rolls, but he continued to refuse.

Although the evidence varies as to whom Mr. Lawery reported the improper dating, it is clear from both Complainant and Respondent’s evidence that Mr. Lawery refused to date the product and informed his immediate supervisor, Ms. Sanders, of his concerns. Therefore, Complainant refused to engage in an assigned task that he reasonably believed violated a food safety law. Thus, his activity falls under the Act. *See* 21 U.S.C. § 399d(4).

In addition, the Complainant raised his concerns a second time when he reported the incident to EthicsPoint, in part to inform the employer about a possible violation. Ms. Wood testified that she did not learn of the incident until several months later, in September, after she was contacted by Mr. Huff. In addition, Mr. Lawery testified that he reported the matter to “every manager in the chain of command.” (TR at 92). Thus, the Complainant provided information about a possible FSMA violation to his employer. Accordingly, I find the Complainant engaged in a protected activity under the FSMA. *See* 21 U.S.C. § 399d(1).

### **III. Adverse Employment Actions**

The next issue in this case centers on the adverse actions the Complainant alleges he suffered. The Complainant generally characterized the actions that followed the protected activity as “unfair treatment by management.” (DX 1). In his complaint to OSHA, the Complainant alleged he received disciplinary action, unfair treatment, and termination in retaliation for his concerns about improper dating. Based on the complaint and the testimony at the hearing, the alleged adverse actions can be broken down into four specific categories. First, the Complainant alleged he suffered a reduction in hours in retaliation for his complaint, an issue he raised in an internal complaint to Respondent. Mr. Lawery also testified that the day after the incident, he was told part of his position would be eliminated. Next, the Complainant went through several disciplinary proceedings in the months following his complaint. Finally the Complainant was ultimately terminated. I will address each possible adverse action in turn.

#### **A. Reduction in Hours**

When the Complainant made a complaint to EthicsPoint, he alleged that his hours were reduced after he raised concerns about the dating of the Hawaiian rolls. At the hearing, he also testified that his hours were reduced from 24 hours a week to 18 per week after he made the EthicsPoint complaint. (TR at101). The evidence indicates Mr. Lawery first raised his concerns about the Hawaiian rolls in late March or early April 2012, and made the EthicsPoint complaint

at some point in late August 2012. Also in the evidence in record is a report of the Complainant's hours worked each week from February through December 2012.

Mr. Lawery reported that after he raised his concerns in April, he was told by Ms. Wood that she could schedule him for 0 hours, and "you won't be able to feed your family, won't have a check." (TR at 48). In his EthicsPoint complaint, Mr. Lawery reported that Ms. Wood told him that if he didn't "get all of his work done then he would get his hours cut more or be scheduled for 0 hours." (DX 1 at 1). There is no evidence that Ms. Wood did not make such a statement, even though she testified at the hearing. I find that she did.

In response to the EthicsPoint complaint, Mr. Huff, the human resources coordinator, conducted an investigation to ascertain whether Mr. Lawery's hours were reduced after the incident with the Hawaiian rolls. As Mr. Huff also had report of hours worked, he concluded that as of August 25, 2012, Mr. Lawery worked 20 or more hours in 19 out of the 26 previous weeks, and only worked under 15 hours in 2 of the 26 weeks. Therefore, Mr. Huff closed the complaint because he was "unable to substantiate the associate's claims." (DX 2 at 2). In addition, Mr. Huff testified that Mr. Lawery's availability could affect how many hours he was scheduled. Also in evidence is the Complainant's availability form, and the Complainant testified he was only available to work the night shift after January 2012. (DX 3).

I find that the Complainant did not suffer an adverse action of reduction in hours immediately following his report of improper dating in April 2012. The Complainant testified that he was told he would work between 24 and 32 hours per week as a part time worker, but also noted that he was only available to work the night shift after January 2012. Ms. Wood testified credibly that a part time employee was required to work a minimum of 12 hours per week and a maximum of 38 hours per week, with the typical employee working between 25 and 30 hours per week. Both Ms. Wood and Mr. Huff thoroughly explained that the scheduling of part time employees was based on availability. The evidence in the record shows that after Mr. Lawery raised concerns about the Hawaiian rolls in April 2012, his hours were over 23 hours a week for at least a month. The availability form in evidence indicates that the Complainant updated his availability on April 28, 2012, and following that date, his hours went below 20 twice in May 2012. The Complainant never worked less than 15 hours between April and August 2012, and frequently worked in excess of 20 hours per week during this time period. Therefore, there does not appear to have been a reduction in hours following his April 2012 report.

The Complainant also alleged a reduction in hours after he made the EthicsPoint complaint in August 2012. Although not discussed in great detail at the hearing, Mr. Lawery testified and the evidence shows that Mr. Lawery's total hours worked dropped below 20 hours between September 1, 2012 and October 6, 2012. In 2 of the 6 weeks following his complaint, he worked under 15 hours per week. I find there was a reduction in hours following Mr. Lawery's EthicsPoint complaint, and therefore Respondent reduced the Complainant's hours and thus his pay, beginning on or about September 1, 2012. Accordingly, I find the reduction in hours beginning September 1, 2012 to be an adverse action.

## **B. Elimination of Position**

Although not specifically alleged in the OSHA complaint, the Complainant testified at the hearing that following the April 2012 incident, his position was eliminated. The Complainant explained that he was hired as a bakery cook, but was unofficially responsible for unloading a delivery truck into the bakery freezer. Immediately following the incident, the Complainant testified that his supervisor held a meeting and told the employees “the truck position would be eliminated.” (TR at 29).

The evidence in record and testimony by the Complainant, Ms. Wood, and Ms. Harvell all demonstrate that there was no specific “truck position,” and even if there were, Mr. Lawery continued to work the truck up until his suspension. On October 31, 2012, Ms. Wood placed a note in Mr. Lawery’s file after an incident which noted that she had asked to “walk the truck” with Mr. Lawery before his shift was completed. (DX 6). Ms. Harvell also testified that she understood that the Complainant’s job title was bakery clerk, and that his responsibilities involved working the truck and baking bread and cookies. The constructive advice record dated December 15, 2012 and testimony from Ms. Wood show that the Complainant was tasked with breaking down the truck and unloading it onto the sales floor and freezer on the night of December 14, 2012. (DX 7). Moreover, Mr. Lawery wrote his own statement in response to the constructive advice record that stated he had “properly worked the truck.” (DX 8).

There is no evidence there was a “truck position,” and it is evident the Complainant continued to be responsible for unloading the delivery truck while he worked for Respondent. The Complainant testified he did not work the truck immediately following the April 2012 incident, and performed other duties, but there is no evidence this unofficial position was eliminated. Therefore, I find that the Complainant’s position was not eliminated and thus he was not subjected to this form of adverse action.

## **C. Disciplinary Proceedings**

The Complainant alleged that following both the April 2012 incident and his EthicsPoint complaint in September 2012, he was subject to multiple disciplinary actions. A disciplinary letter or employer warning may rise to the level of an adverse action. *See Horton v. Crossmark, Inc.*, 2014-FDA-00004 (ALJ June 8, 2015) (finding a counseling memorandum to be an adverse action). Under the standard set forth in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006), the action must be “materially adverse to a reasonable employee,” or in other words, “must be harmful to the point that [the action] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. at 57. Although the *Burlington Northern* standard applies to Title VII retaliation claims, it has been applied in FSMA cases. *See Horton, supra*. The ARB has also explained that warning letters constitute adverse actions as they materially affect the complainant’s employment, or in other terms, lead to “tangible consequences.” *Melton v. Yellow Transp. Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, PDF at 9–12, 20–24 at 7 (ARB Sept. 30, 2008) (Beyer, J., writing for the majority applied the “tangible consequences” test; Transue, J., and Douglass, J., concurring, found the “tangible consequences” and “materially adverse” tests to be interchangeable, but the “materially adverse”

test from *Burlington Northern* governs). Therefore, letters that leave the employee vulnerable to discipline, subject to progressive discipline procedures, or subject to special investigations are adverse actions. *Melton*, at 12 (citations omitted).

In this case, the Complainant reported two verbal warnings made by management about his attendance. In his EthicsPoint complaint, Mr. Lawery reported that he was told he “would be disciplined, including termination,” if he came to work late and that similar statements were not made to other employees. (DX 1 at 1). He also reported being scheduled for a shift for which he was unavailable, and was told “if he did not work that shift he would be considered as having given up his job.” *Id.* at 2. As these incidents constitute a verbal warning by the Employer about the Complainant’s performance, I find they are both a material action and one that has tangible consequences. Verbal warnings are often the first step in progressive disciplinary policies, and the Complainant was told he could be disciplined further, including termination. Therefore, I conclude these warnings are adverse actions.

The evidence in the record also shows several “notes to file,” in the form of statements and in the form of constructive advice records that were not given to Mr. Lawery but marked “NTF.” Based on the evidence, it appears that the notes to file were included in the Complainant’s personnel file after he was given verbal warnings. For example, on April 28, 2012, Mr. Lawery was verbally warned about the failure to prepare a bread order, proper cold chain management, and that he could not video or take photographs on the sales floor. (DX 4–5). Another note to file was included in evidence from October 31, 2012, in which Ms. Wood reported that she told the Complainant that he would be suspended pending “for gross insubordination if he continued to raise his voice with me.” (DX 6). As these notes to file were documentation of verbal warnings with potential consequences of further discipline, I find they are adverse actions.

In addition, there are several statements and constructive advice records dated December 15 and 16, 2012 that indicate the Complainant was subject to more formal disciplinary proceedings. The evidence shows Mr. Lawery met with store management on December 15, 2012, and received a constructive advice record for “not working the truck properly.” (DX 7). Mr. Lawery refused to sign and issued a statement that he had worked the truck properly, and was being “unfairly targeted.” (DX 8). The constructive advice record warned that failure to work as instructed “will require further disciplinary action up to and including termination.” (DX 7). On December 16, 2012, a proposed constructive advice record was created for failure to follow instructions, but the form shows it was not issued. (DX 9). The same day, another constructive advice record was issued and a meeting held for the Complainant’s disregard of rules and regulations. (DX 12). The record also showed the Complainant was suspended pending an investigation for the violation of store rules and regulations. *Id.* In response, Mr. Lawery refused to sign and submitted a written statement that stated he had been harassed and the charges against him were false. (CX 11). The constructive advice records are all part of a progressive disciplinary process that culminated with the Complainant’s suspension pending an investigation. Accordingly, they are adverse actions as they were both materially adverse to the Complainant and had tangible consequences, namely the Complainant’s suspension, which was also clearly an adverse employment action.

#### **D. Termination**

Mr. Lawery also complained that he was terminated on January 3, 2013 in retaliation for his protected activity. Termination is an adverse action. *See, e.g., Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ 2006-AIR-022, HTML at 15–16 (ARB June 30, 2009). Thus, when Mr. Lawery was terminated after his suspension, I conclude he suffered an adverse action.

#### **IV. Contributing Factor**

After a complainant has demonstrated that he engaged in a protected activity and suffered an adverse action, he must show by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1987.109. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Powers v. Union P. R.R. Co.*, ARB No. 13-034, 2010-FRS-030, PDF at 11 (ARB March 20, 2015) (citations omitted). This element may be proven “by direct evidence or indirectly by circumstantial evidence.” *Id.* (citations omitted).

##### **A. Reduction in Hours**

The evidence in the record shows, and I have found, that the Complainant suffered a reduction in hours immediately following his EthicsPoint complaint in August 2012. For the reasons that follow, however, I conclude that the Complainant has not met his burden to demonstrate that his protected activity was a contributing factor in this particular adverse action. Although there is no direct evidence in the record to show that the Complainant’s protected activity led to a reduction in his hours, the evidence does show that his hours were reduced significantly in the six weeks after his EthicsPoint complaint. This is sufficient to establish indirect evidence of a contributing factor because there was “temporal proximity” between the protected activity and adverse action. *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ 2009-SOX-025, HTML at 12 (March 28, 2012) (explaining “[w]hile not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation; this indirect or circumstantial evidence can establish causation in a whistleblower retaliation case.”). Absent other evidence, the circumstances appear suspicious. *See Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997) (affirming finding that employee had made his showing of a contributing factor where the employee made a complaint and was demoted the following day).

However, there is direct evidence in the record that the reduction in hours in September and October was due to Respondent’s switch from a manual to an e-scheduling system. Ms. Wood testified that the store began using the e-scheduling system in late summer 2012. Mr. Huff also offered the credible explanation that that availability would impact the time in which an employee was scheduled, because an employee with less seniority but more availability would be given priority by the system. Even Mr. Lawery stated in his EthicsPoint complaint that he had been scheduled for a time he could not work on August 28, 2012, and that the new scheduling system prevented him from being able to update his availability. Moreover, DX 2, the summary of Mr. Lawery’s hours worked shows that his hours varied each week. Outside of the 6 week

period following the EthicsPoint complaint, Mr. Lawery worked under 20 hours per week on 6 occasions between May and September. This is further supported by the testimony of Ms. Wood, who noted that a part-time employee is required to work at least 12 hours per week, but will generally work 25-30 hours based on seniority and availability.

Therefore, the evidence in the record shows a new e-scheduling system was implemented at approximately the same time as the protected activity, and it affected the Complainant's hours worked. Although management signed off on the computer generated schedules, the fact that a computer was used to generate the schedule based on seniority and availability indicates that the Complainant's protected activity was not a consideration of the e-scheduling system. Therefore, I conclude that the Complainant has not shown by a preponderance of the evidence that the protected activity was a contributing factor in the reduction in hours.

## **B. Disciplinary Proceedings**

As discussed above, the Complainant in this case received progressive disciplinary actions. Within a few weeks following the incident in which Mr. Lawery voiced his concerns to management about the improper dating of the Hawaiian rolls, he was verbally warned and a note to file was placed in his personnel file about the failure to prepare a bread order, proper cold chain management, and videoing or photographing on the sales floor. The Complainant also received verbal warnings about his attendance at work and scheduling which occurred both after the initial reporting of improper dating, and immediately prior to his EthicsPoint complaint. Mr. Lawery reported in his EthicsPoint complaint that the verbal warnings about tardiness were "unfair because Ms. Wood didn't say this to any other employees." (DX 1). Subsequent to the EthicsPoint complaint, a note to file was issued and verbal warning was given to Mr. Lawery concerning an incident with Ms. Wood on October 31, 2012. The warning was given by Ms. Wood because she alleged Mr. Lawery yelled at her on the sales floor. Further disciplinary action was taken in the form of constructive advice records dated December 15 and 16, 2012. Mr. Lawery was disciplined on those occasions for failure to work the truck as instructed, and for disregard of store rules and regulations. Following the constructive advice record issued on December 16, the Complainant was suspended pending an investigation.

As with the reduction in hours, there is no direct evidence in the record to suggest that the Complainant's protected activity was a contributing factor in any of these disciplinary proceedings. Indirect evidence that may be used to establish a contributing factor, in addition to temporal proximity, includes "indications of pretext, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more." *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011). There is indirect evidence that the Complainant received verbal warnings on April 28, 2012, a few weeks after the initial protected activity, and this timeframe shows a temporal proximity. In addition, the Complainant reported he received a verbal warning about tardiness, which he claimed was unfair because other employees did not receive the same warning, in a meeting with Ms. Wood several days after the April 2012 protected activity. The Complainant also testified that when he informed Ms. Wood of his concerns about improper dating in April, she told him she could "schedule you for zero hours . . . you won't be able to feed your family." (TR at 48). In addition, the Complainant credibly testified that he had reported the improper dating concerns to

both Ms. Vickers and Ms. Wood, the managers who gave him verbal warnings in the month following the protected activity.

While there is a temporal proximity between the Complainant's protected activity and the April 28, 2012 action, the documentary evidence in the record indicates, and I conclude, that the possible verbal warning and note to file were due to performance issues. Although it is not clear whether Mr. Lawery was in fact verbally warned about his failure to bake a bread order on April 27, 2012, he testified that he missed the order and described Ms. Wood as very angry about the situation. A note to file dated April 28, 2012 corroborates that Mr. Lawery failed to bake the bread order. An additional note to file written by Ms. Vickers indicates that on the same date, she found Mr. Lawery videotaping, and informed him he must stop. The Complainant submitted a YouTube link at CX 9, and the Complainant testified it is a video he took of the sales floor. The resulting discussion in Ms. Vicker's office focused on the requirements of Mr. Lawery's job and the expectation that he get "all the product out and worked into the freezer." (DX 5). The note also indicated that Mr. Lawery had "8 pallets of frozen on the sales floor" when Ms. Vickers arrived in the morning, and that they discussed proper cold chain management. *Id.* Mr. Lawery testified that he was "surprised" by the cold chain management discussion, and that he had not been taught this policy. (TR at 71). The evidence establishes, and I conclude, that the topics covered in the conversation between the Complainant and management were related to misconduct and poor performance on the part of Mr. Lawery, and were not related to his protected activity.

As to the verbal warnings from Ms. Wood in April 2012, Mr. Lawery did not remember whether he was written up, but testified that Ms. Wood "threatened to cut my hours down to zero." (TR at 88). This meeting with Ms. Wood occurred a few days after the incident involving the Hawaiian rolls. The Complainant testified that he had one prior discussion with Ms. Wood about his tardiness before this meeting, and that during the meeting Ms. Wood addressed both the Complainant's tardiness and performance. The Complainant alleged that he brought up the improper dating of the Hawaiian rolls in this meeting, but Ms. Wood testified that the first time she was told about the improper dating was by Mr. Huff in September 2012. There is very little evidence in the record about this action, and I found both Ms. Wood and Mr. Lawery to be credible witnesses. Therefore, I find that Ms. Wood did not consider the Complainant's protected activity when she spoke with him about his tardiness and performance. It was Mr. Lawery, and not Ms. Wood, who raised the issue of the improper dating, his testimony establishes that he did so only after Ms. Wood called him into her office and discussed the tardiness and performance issues. The only evidence that Ms. Wood might have known about the improper dating incident is the Complainant's testimony that, as the meeting occurred approximately 4 days after the incident and he had "talked to every manager in the chain of command," Ms. Wood would have had the opportunity to hear about his complaint. (TR at 92). This speculation is not sufficient to prove by a preponderance of the evidence that the protected activity was a contributing factor in the verbal warning.

The remaining disciplinary actions lack direct or indirect evidence that would show the Complainant's protected activity affected the disciplinary actions in any way. First, the Complainant reported to EthicsPoint that he was warned by Ms. Fitzpatrick that if he did not work a shift he "would be considered as having given up his job." (DX 1 at 2). This action

occurred prior to the EthicsPoint complaint, and approximately four months after the April 2012 protected activity. Under the circumstances of this case, with a number of intervening events, this period of time is not sufficient on its own to demonstrate a temporal proximity. *See Wascura v. City of S. Miami*, 257 F.3d 1238, 1245 (11th Cir. 2001) (finding a three and a half month period between protected activity and adverse action to be insufficient to show the protected activity was a contributing factor).

The note to file dated October 31, 2012 is not particularly close in time to the EthicsPoint complaint. There is no indication of pretext, inconsistent application of employer's policies, or shifting explanations for an employer's actions. *See Bechtel, supra*. Instead, the testimony of Mr. Lawery and Ms. Wood contain two very different versions of the occurrences that evening that show the continued deterioration of the working relationship between the two. The Complainant testified that he was asked to stay late that evening to fix an issue, and that Ms. Wood had become upset and assaulted him at the time clock. Ms. Wood testified that she had asked the Complainant about something that was not done prior to his shift ending, and that the Complainant yelled at her in response. She further testified that she was confused by the Complainant's response as she had not requested that he stay late, and that his actions made her "very, very uncomfortable." (TR at 137). At that point, Ms. Wood verbally warned the Complainant that if he did not stop yelling, she would have to suspend him for gross insubordination. There is not sufficient evidence in the record to show that Ms. Wood's verbal warning was a pretext for retaliatory disciplinary action. Ms. Wood testified that she did not issue a written warning, and filed an email to Mr. Huff as a note to file. As discussed above, I found both witnesses to be generally credible, but on this issue, I credit the testimony of Ms. Wood over that of Mr. Lawery. October 31, Mr. Lawery's perception of his treatment had reached the point that he misinterpreted an unintentional bump as an intentional assault. The burden is on the Complainant to prove the contributing factor by a preponderance of the evidence, and in this instance, he has not done so.

The disciplinary actions of December 15 and 16, 2012 are too far removed from the EthicsPoint complaint to demonstrate indirect evidence of a contributing factor. The Complainant testified, and submitted written statements in response to the constructive advice records, that every disciplinary action was a pretext, and that he was "unfairly targeted" by management. *See* (DX 1, DX 8, CX 11, TR at 39). However, this is not the case, as demonstrated by the reports and supporting testimony and statements from other employees about the actions that occurred on December 15 and 16. The Complainant was first disciplined for not working the truck properly, a proposed constructive advice record was issued but not given for failure to complete the task of baking cookies, and then Complainant was suspended pending investigation for a violation of store rules and regulations. Although these are adverse actions, there is no evidence beyond the Complainant's claims that he was unfairly targeted that indicate how they might be related to his protected activity. The interactions between the Complainant and the store managers between April 2012 and his suspension, as evidenced in testimony and documentary evidence, all indicate that the Complainant had difficulty performing assigned tasks. There is no evidence in the record that Respondent's actions were a part of a plan to harass or terminate the Complainant. The evidence shows the Complainant struggled with the expectations of his job, and at various times managers stepped in to instruct and advise him on proper methods.

Further, the suspension of the Complainant stemmed entirely and directly from statements he made to a coworker that violated the store rules and regulations. The conduct at issue in all of the constructive advice records was documented, either by prior notes to file or by the written statements of other employees. , the weight of the evidence establishes, and I find, that the disciplinary proceedings of December 15 and 16, 2012 were based on events that occurred on those days, and that the protected activity was not a contributing factor in them. Accordingly, I conclude the Complainant has not met his burden as to these particular proceedings.

### **C. Termination**

The Complainant was terminated on January 3, 2013, but there is no direct evidence of a causal connection between the protected activity and termination. As with the disciplinary proceedings, the Complainant credibly alleged that his termination was a pretext, and a result of a pattern of harassment that began with his initial complaint about improper dating. The letter and separation notice of January 3, 2013 states that the Complainant was terminated for a violation of store rules. There is no indirect evidence to support an inference that the Complainant's protected activity was a factor in the termination. There was no temporal proximity, as the suspension and termination occurred 3–4 months after the EthicsPoint complaint. Nor does the evidence show the termination was a pretext.

Instead, the evidence includes a 5 page statement from the Complainant's coworker that, at length and in great detail, reported the statements the Complainant made to her, along with the store policy on harassment. Both Ms. Wood and Mr. Huff credibly testified they found the statements "offensive," and "egregious," and noted Ms. Sweeney's statement was corroborated by one other employee. (TR at 148, 219). Following the meeting of December 16, 2012, the evidence shows the Complainant made a statement about the school shooting in Connecticut to Ms. Harvell. Although the parties dispute the precise intent of the statement, it was perceived as a threat by management as it prompted Mr. Huff to ask Ms. Harvell and Ms. Wood to file a police report, and security was placed in the store. Ms. Harvell credibly testified that she felt the Complainant had threatened the employees of the store. The weight of the evidence establishes, and I find, that the Complainant was terminated for a violation of store rules and regulations, and over a significant concern for employee safety following the Complainant's statement about a very recent school shooting. Therefore, I conclude that the Complainant has not established by a preponderance of the evidence that his protected activity was a contributing factor in his termination.

### **CONCLUSION**

The Complainant has not met his burden to show by a preponderance of the evidence that his protected activity was a contributing factor in the reduction of his hours, the disciplinary proceedings, or his termination, and his complaint must therefore be denied.

## ORDER

For the reasons set forth above, Mr. Lawery's complaint is **DENIED**.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District Chief 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, 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).