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Office of Administrative Law Judges
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Issue Date: 10 November 2015

Case No.: 2014-FDA-00006

In the Matter of:

JOHNNY C. GONZALEZ,
Complainant,

v.

MILK SPECIALITIES GLOBAL (MSG)
and
IQ RESOURCE GROUP,
Respondents.

Appearances:

Johnny C. Gonzalez, pro se
Wild Rose, Wisconsin
For the Complainant

Kevin Hofman, Esq.
Halleland Habicht, PA
Minneapolis, Minnesota

Stephani Sundry, Esq.
Eden Prairie, Minnesota
For Respondent Milk Specialties Global

Bruce Chesshire, Esq.
Milwaukee, Wisconsin
For Respondent IQ Resource Group

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

Background and Procedural History

On or about January 9, 2014, Johnny C. Gonzalez (“Complainant”) filed a formal complaint with the U.S. Department of Labor (“DoL”), Occupational Safety and Health Administration (“OSHA”), under Section 402 of the FDA Food Safety Modernization Act (“FSMA”),¹ alleging that his former employers, Milk Specialties Global (“MSG”) and IQ Resource Group (“IQ”) retaliated against him by terminating his employment with MSG for complaining about unsafe working conditions and possible cross contamination. After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator for OSHA, Chicago, Illinois, issued a final determination letter dated May 30, 2014, dismissing the complaint.

On July 3, 2014, Complainant filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“OALJ” or “Office”). On August 19, 2014, I issued a *Notice of Assignment and Pre-Hearing Order*, within which I set a hearing date. (ALJX 1.)² Subsequently, I issued an order changing the time of the hearing and an order granting Respondent IQ Resource Group’s request for continuance.³ (ALJX 2, 3.)

On June 11, 2015, I convened a formal hearing at the Edward J. Devitt Courtroom, Warren E. Burger Federal Building and U.S. Courthouse in St. Paul, Minnesota. All parties were afforded a full and fair opportunity to present evidence and argument. Mr. Gonzalez represented himself in this matter.⁴ (Tr. 5-7.) The following were accepted into evidence: five exhibits from Complainant (Tr. 57); two exhibits from MSG (Tr. 124)⁵; ten exhibits from IQ (Tr. 97); and five Administrative Law Judge exhibits (Tr. 225). Five witnesses testified at the hearing, including Complainant, who testified on his own behalf.⁶ Jesse Rohloff, Senior Staffing Consultant at IQ, testified for IQ. (Tr. 73-98.) Three witnesses testified on MSG’s behalf: Dana Finn, Regional Human Resources Manager for MSG, (Tr. 100-15); Cynthia Norem, Production Lead with MSG, (Tr. 124-64); and Dawn Kikendall, Production Supervisor during Mr. Gonzalez’s employment with MSG. (Tr. 164-211.) The record remained open post-hearing for the submission of post-

¹ 21 U.S.C. § 399d, with implementing regulations at 29 C.F.R. § 1987.

² The following references will be used: “Tr.” for the official hearing transcript; “CX” for a Complainant’s exhibit; “IQX” for an exhibit from Respondent IQ; “MSGX” for an exhibit from Respondent MSG; and “ALJX” for an Administrative Law Judge’s exhibit.

³ Counsel stated that he serves on the Board of Directors for Temporary Services Insurance Ltd., which was scheduled to hold its annual meeting on the hearing date. *See* ALJX 3.

⁴ As a pro se complainant lacking legal expertise, this Court will analyze Mr. Gonzalez’s arguments “with a degree of adjudicative latitude.” *Hyman v. KD Resources, Inc, et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip. op. at 8 (ARB March 28, 2010) (citing *Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008)).

⁵ MSGX 2 was withdrawn, leaving only MSGX 1 and 3. (Tr. 224-25.)

⁶ Complainant identified 11 possible witnesses in his prehearing statement, but did not request any subpoenas and was the only witness appearing on his behalf. (ALJX 4.) Complainant told the Court that it was his intent that his prehearing statement would be a request to have those witnesses at the hearing. (Tr. 66-71.) However, Complainant subsequently withdrew his request to bring other witnesses, stating that he would “like to get back home.” (Tr. 71.)

hearing briefs. (Tr. 225, 232.) Briefs were received from all parties.⁷ Complainant is seeking “compensation for [his] wrongful termination.” (Complainant’s *Post-Hearing Brief* at 1.)

The following findings and conclusions are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and relevant precedent. Although I do not discuss below every exhibit in the record, I carefully considered all the testimony and exhibits in reaching this decision.

Issues

- I. Was Complainant’s engagement in a protected activity a contributing factor in an adverse employment action taken against him?
 - A. Did Complainant engage in protected activity under the FSMA?
 - B. Was Complainant’s termination from MSG an adverse action under the FSMA?
 - C. Was there a causal connection between any protected activity engaged in by Complainant and an adverse action taken against him?
- II. If Complainant’s engagement in a protected activity was a contributing factor in an adverse employment action taken against him, have Respondents demonstrated by clear and convincing evidence that they would have taken the adverse employment action regardless of Complainant’s engagement in protected activities?

Positions of the Parties

Stipulations

Respondents stipulated that both MSG and IQ are Employers under the FSMA and that Complainant was an Employee of both MSG and IQ under the FSMA. (Tr. 15.)

Complainant

Complainant believes that he was terminated from his job at MSG in retaliation for voicing concerns over food safety issues and unsafe working conditions.⁸ (Complainant Post-Hearing Brief.) Complainant cites six incidents regarding food safety and unsafe working conditions that arose during his employment at MSG: (i) cross-contamination occurring on

⁷ Complainant submitted his brief (“Complainant Post-Hearing Brief”) on July 14, 2015; MSG submitted its brief (“MSG Post-Hearing Brief”) on August 18, 2015; and IQ submitted its brief, *Argument in Support of Dismissing Complaint* (“IQ Post-Hearing Brief”), on September 8, 2015.

⁸ Complainant may also be arguing that IQ’s failure to assign him to another job, despite his request for a new placement, was in retaliation for voicing his concerns about food safety issues and unsafe working conditions. Complainant testified that he had asked IQ for a new work placement on January 6, 2014, and that he had called after that date as well. (Tr. 48, 50, 59.) However, Complainant has not explicitly made this argument at any point in these proceedings.

January 6, 2014 when Mr. Gonzalez filled pouches with product and then boxed them,⁹ (Tr. 36); (ii) poor ventilation on January 6, 2014, resulting in both unsafe working conditions and cross-contamination (Tr. 35, 36); (iii) safety concerns about unloading a trailer with a hand jack, (Tr. 216-17); (iv) safety concerns regarding tripping over a forklift, (Tr. 39-40, 217); (v) safety concerns about hitting his head in the absence of a chair to sit at, (Tr. 214); and (vi) cross-contamination occurring on January 7, 2014 when the room was not properly sanitized between products, (Tr. 37-38, 215). Complainant asserts that although he was told that he was terminated from his job because he violated MSG's policy on good manufacturing practices ("GMP") by improperly disposing of gloves, he did not dispose of gloves improperly or violate GMP policy. (Complainant Post-Hearing Brief.) Complainant states that he was a good employee for MSG. (Tr. 220.)

Respondent MSG

MSG submits that Mr. Gonzalez did not report a concern about an unclean hopper on January 7, 2014. Therefore, that concern could not have factored into the decision to terminate Mr. Gonzalez. (MSG Post-Hearing Brief at 7.) Additionally, MSG production reports show that no cross-contamination occurred. (Tr. 137.) MSG acknowledges that Mr. Gonzalez reported concerns of hitting his head and cross-contamination on January 6, 2014 to Cynthia Norem. MSG contends that both concerns were adequately addressed by Ms. Norem, and later, by Dawn Kikendall. (MSG Post-Hearing Brief at 6-7). Additionally, MSG asserts that Mr. Gonzalez's concern regarding fumigated boxes could not have resulted in cross-contamination because MSG has never used fumigated boxes, so "no cross contamination can possibly occur." (MSGX 1.) MSG states that the concerns were all appropriately addressed by MSG and were not a contributing factor in the decision to terminate Mr. Gonzalez. (MSG Post-Hearing Brief at 10-11.) MSG argues that terminating Mr. Gonzalez's employment was not an adverse employment action under the FSMA. (Tr. 15.) MSG contends that Mr. Gonzalez was terminated only because: (i) he did not follow the policy on GMPs that he agreed to during his orientation with MSG; and (ii) "he was repeatedly disrespectful and confrontational." (MSG Post-Hearing Brief at 1.) Finally, MSG argues that there is clear and convincing evidence that MSG "would have fired Mr. Gonzalez for his disrespectful and confrontational behavior, no matter what." (MSG Post-Hearing Brief at 2.)

Respondent IQ

IQ acknowledges that it provides staffing employment to MSG, which entails selecting applicants to assign to MSG. (Tr. 76.) IQ contends that MSG did not take adverse action against Mr. Gonzalez. (IQ Post-Hearing Brief at 6.) IQ also asserts that it did not take any adverse action against Mr. Gonzalez, and kept him as an employee after he was terminated by MSG. (IQ Post-Hearing Brief at 5.) IQ states that between December 12, 2013 and January 8, 2014, IQ did not speak with Mr. Gonzalez, and did not learn of his concerns of cross-contamination at MSG during this period of time. (IQ Post-Hearing Brief at 5.) IQ acknowledges that Mr. Gonzalez's January 6 concern of cross-contamination "squarely falls within the purview" of the FSMA, (IQ Post-Hearing Brief at 3), but that "even under [Mr. Gonzalez's] version of the events, it was

⁹ Although Mr. Gonzalez articulated a concern about fumigated boxes in his OSHA statement, he did not mention fumigated boxes in the proceedings before this Office.

resolved to his satisfaction,” (IQ Post-Hearing Brief at 5). IQ claims that MSG appropriately addressed all of Mr. Gonzalez’s concerns, and that his “complaints were not a contributing factor in his termination.” (IQ Post-Hearing Brief at 6.) Finally, IQ claims that Mr. Gonzalez did not ask IQ to find him a new work assignment on January 6, 2014, or at any time after. (Tr. 98.)

Summary of the Evidence¹⁰

Testimony

Complainant - Johnny C. Gonzalez (Tr. 33-66, 213-24.)

I began working at MSG on December 11, 2013. (Tr. 35.) I “worked hard for [MSG] and I was very productive.” (Tr. 220.) I worked ten hours a day for ten days straight. (Tr. 222.) I worked at a number of tasks at various times. On occasion, I filled bags with food product, using a scale to ensure the correct weight. (Tr. 35.) At other times, I sealed the bags after they were weighed. (Tr. 38.) I also “palletized,” putting the bags of product onto pallets and covering them with stretch wrap. (Tr. 42.)

January 6, 2014

On January 6, 2014 I was working in “a skeleton crew” with only three employees in the room instead of six to eight workers. The ventilation was not working in the room during that shift, and the door was kept open. (Tr. 35.) Keeping the door open “contaminated the room and the product.” I filled, weighed, and sealed bags, and then loaded the bags onto pallets. (Tr. 36.) The job that I was assigned to was a “sitting position job. It didn’t have to be, but you could be awkward and doing it.” (Tr. 213.) Someone took my chair away. There was a funnel coming down that I thought I could hit my head on if I did the job standing. I spoke with Lori about my concerns, through a facemask that I had on. I told her about the funnel, and in response she gave me a hard hat to wear. “I wasn’t happy” with that response, but I did my job. (Tr. 214.) I also spoke with Cindy Norem because I was concerned about potential cross-contamination. After that conversation, I went into an office with Cindy to speak with the manager, Dawn Kikendall. Dawn told me that I was only to fill, weigh, and seal the bags; other workers were to load the bags onto pallets. January 6 was “an isolated incident” that was “taken care of” by the meeting with Dawn. (Tr. 36.)

I called IQ on Monday, January 6, 2014. I told them about “the first incident.” The person I spoke with at IQ asked, “Is everybody fine?” and I replied, “I think so, but I want you to find me a different job.” (Tr. 48.) The phone records in my exhibits do not reflect all of the calls I made to IQ. I was unable to get call records from another service provider, Charter Company. (Tr. 59.)

¹⁰ The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing, but merely to highlight certain relevant portions.

January 7, 2014

On January 7, 2014 I began my shift at 6:00 am, in a different room than on January 6. I waited with other employees while maintenance personnel emptied a hopper that had a yellow substance in it. Afterwards, other employees and I swept out the hopper. When that was done, a chocolate flavor was put through the hopper, and I filled and weighed pouches by hand. (Tr. 37.) Running the chocolate product without properly cleaning the yellow substance out of the hopper and wiping down the room resulted in contamination. (Tr. 38.) “We should have sterilized the room from the other product, dust, everything; wash the walls; wash the ceiling; do the floors; do the machinery; but that wasn’t done. It was rush, rush, rush.” (Tr. 215.) However, I did not voice my concerns with anyone because I had already gotten in trouble the day before, and Cindy Norem was encouraging the workers to get going with the new product. (Tr. 38.) The ventilation was not working, but the door was kept closed. Workers that did not wear facemasks or respirators had to breathe in dust; I knew some people who had gotten nosebleeds and headaches after working with this product. Gloves had to be worn at all times while working in this room. (Tr. 39.)

The workers routinely rotated tasks after breaks. Initially, I had been filling and weighing the pouches. After the first break I switched tasks, and began sealing the pouches. After another break I began the new task of putting the product in pallets. (Tr. 38.) At this time, I was wearing a facemask. (Tr. 217.) My new task, palletizing, required me to use a hand jack to pull the pallet up a ramp, then use stretch wrap. (Tr. 39.) Lori Adler is in charge of the area that I began working in. There was a forklift blocking the stretch wrap. (Tr. 217.) On the way down the ramp, I tripped over the forklift parked in front of the ramp. (Tr. 39.) I approached Lori for help, and she indicated that I should take the issue to someone higher than her. I also told Cindy that the forklift was in my way. (Tr. 40.) I said, “Here, I’ve got a problem right there.” (Tr. 217.) Cindy and Lori argued and pointed fingers at me, and I “was pointing fingers to them,” although I did not say anything because I was too far away from them to be heard. Cindy said that she did not know what to do. (Tr. 40.) “I never said that I was fighting or I was calling them bitches.” (Tr. 217.) I did not behave aggressively. (Tr. 222.) Dawn Kikendall did not know anything about the “confrontation about the stretch wrap” until I was being dismissed on Wednesday, January 8. (Tr. 216.)

January 8, 2014

I began work in room number one, at 6:00 in the morning. Cindy Norem came in and told me that I was going to work on Line Three.¹¹ (Tr. 41.) Alexandra Raymond was in charge of Line Three. (Tr. 48.) I began by palletizing, but I was subsequently told to unload product from a trailer. (Tr. 42.) It was hard to empty the trailer because “I had trouble maneuvering the hand jack.” (Tr. 216.) The hand jack could have run over my feet, and that “would have been a big-time safety issue.” (Tr. 216-17.) Although my assigned task was to unload the pallets from a trailer, I also spent part of the shift helping Cindy to palletize. (Tr. 44.) I was not wearing gloves during the performance of these tasks on Line Three. (Tr. 42, 46-47, 52.) “Nobody that works in that area wears gloves of any kind”; only workers in fill rooms wear gloves. (Tr. 43.) “Outside the room, nobody wears gloves, including the person “stacking the boxes on the

¹¹ In later testimony Complainant states that he was working on Line Four. (Tr. 216.)

pallets.” (Tr. 216.) I palletized until I left to use the bathroom. (Tr. 42.) The bathroom has two stalls. (Tr. 43.) When I entered the bathroom the one on the right was occupied. I asked the other person in the bathroom where he was working, to which he replied, “You know that I’m working with you. What’s the matter with you?” (Tr. 44.) I did not go to the bathroom with my gloves on and I did not toss gloves down or under the stall. (Tr. 217.) After I exited the bathroom, I began looking for Cindy in order to help her finish palletizing. (Tr. 44.) I did not know where Cindy was, and returned to my task of unloading the trailer. Cindy later approached me and told me, “Dawn wants to see you.” I subsequently met with Dawn, Cindy, and Dan Waite. I was asked why I threw gloves on the floor, and told that I had violated MSG’s policy. (Tr. 45.) I was asked how I normally dispose of my gloves. I replied that I normally throw them in the work area trash can or in the garbage located by the nets, work gloves, and safety equipment. (Tr. 45, 46.) At that point, Dan left the meeting. When he returned and asked me where I put my gloves, I again replied, “Normally I put them in the garbage.” Dan responded that he did not find any gloves in the garbage. (Tr. 46.) During the meeting I told Dawn to investigate the circumstances of my dismissal because it was a conspiracy, and that people had a vendetta against me. I also thanked MSG for giving me work. Dan walked me out at the conclusion of the meeting. I said goodbye to coworkers as I was leaving, and I told them that I was being dismissed. (Tr. 49.) I was disappointed to be terminated by MSG. (Tr. 50.) “The whole thing is but a total misunderstanding.” (Tr. 213.)

I called IQ, telephone number 920-738-0020, on Wednesday, January 8, 2014, after being terminated. (Tr. 48, 56; CX 4.) I spoke with an IQ representative for eight minutes. (Tr. 48; CX 4.) During that conversation I told IQ to investigate why I was terminated by MSG. (Tr. 48.)

After Being Dismissed

I called IQ after January 8, 2014. I wanted to know if IQ had a job for me, but I was told that IQ did not have anything at this time, and that they would call when they did. IQ has not called me since. (Tr. 50.)

Jesse Rohloff (Tr. 73-98.)

I have worked as a Senior Staffing Consultant with IQ for a little over a year and a half. (Tr. 75.) I am in charge of the office. (Tr. 93.) IQ works closely with MSG, with communication between the companies on a daily basis. (Tr. 75-76.) IQ provides staffing and employment to MSG, which entails selecting applicants to assign to MSG. IQ reviews applications, including work history, in order to place employees. (Tr. 76.) Mr. Gonzalez was paid by IQ while working at MSG. (Tr. 97.)

IQ provides an orientation for individuals placed at MSG. (Tr. 76.) I have conducted some of that orientation process, so I am familiar with it. (Tr. 76-77.) Mr. Gonzalez’s file in our database contains documents signed by Mr. Gonzalez during his orientation. (Tr. 77-83.) Those documents include two acknowledgements by Mr. Gonzalez that he received MSG’s policy on GMPs. (Tr. 77-79; IQX 1; IQX 3.) One acknowledgement is contained in the GMP Agreement, (Tr. 77), and the other is in paragraph three of the Milk Specialties and IQ Acknowledgement

Agreement Form.¹² (Tr. 78-79.) IQX 2 details MSG's GMPs; it is the document that Mr. Gonzalez acknowledged receipt of in IQX 1 and IQX 3. (Tr. 78.) IQX 4-7 are the temporary orientation packet, from IQ and MSG, which was given to Mr. Gonzalez, and that he acknowledged receiving. (Tr. 81-83.)

IQX 9 is a copy of applicant notes from Mr. Gonzalez's file. (Tr. 83.) Incoming and outgoing calls are noted, along with a time stamp and the initials of the representative who entered the notes. (Tr. 83-84.) The standard practice was for IQ representatives to make an entry in the database notes when an employee called in. (Tr. 88.) To my knowledge, Mr. Gonzalez did not call on Monday, January 6. (Tr. 90, 92.) A note dated January 8, 2014, reproduced in IQX 9, correctly reflects a conversation I had with Mr. Gonzalez when he called to ask questions about his termination from MSG. (Tr. 83-87.) IQX 10 is "an email from our client letting us know the details as to Johnny Gonzalez's termination." (Tr. 87.) It was received on January 8 and was kept in Mr. Gonzalez's assignment notes. (Tr. 87-88.) I reviewed it while going over what happened with Mr. Gonzalez. (Tr. 88.) The email terminating Mr. Gonzalez was the reason that IQ did not return Mr. Gonzalez to his assignment at MSG. As far as I know, Mr. Gonzalez was a good employee for IQ before January 8. (Tr. 92.) IQ received a call from Mr. Gonzalez on January 8 at 11:50 a.m., regarding his termination from MSG. (Tr. 90-92.) He did not ask me to investigate his termination. (Tr. 91-94.)

Mr. Gonzalez remained an employee of IQ after his January 8 termination from MSG. (Tr. 97-98.) However, after January 8, there is no record of IQ receiving any calls from Mr. Gonzalez for additional work assignments. (Tr. 88, 98.)

Dana Finn (Tr. 100-115.)

I work for MSG as the Regional Human Resources Manager. (Tr. 101.) I have worked for MSG for almost five years, and I have been regional HR manager for four years. (Tr. 101-102.) MSG manufactures protein blended to customer specifications, jars the protein, and ships it to customers who sell it retail. My job entails "recruiting, employee relations, training, on-boarding," and other activities. (Tr. 101.)

I conducted an investigation in response to Mr. Gonzalez's complaint with OSHA. (Tr. 102.) "I only investigated what was listed in [Mr. Gonzalez's] initial complaint." (Tr. 110.) MSGX 1 is "the response I had prepared to Mr. Gonzalez's claim based on the investigation that was completed" on February 17, 2014. The report is based on information from people with knowledge of the events. (Tr. 103.) Workers report to Cynthia ("Cindy") Norem. At the time, Cindy reported to Dawn Kikendall, who was then the Production Supervisor. (Tr. 105.)

January 6, 2014

In my investigation, I "discovered that there was never any concern mentioned regarding fumigated boxes and, also, that the plant had never contained any such boxes." I also investigated the chair in the assembly area and found that "there was a chair originally found in

¹² The form reads "I acknowledge that I received a copy of Milk Specialties' Good Manufacturing Practices Policy and that I thoroughly read Milk Specialties' Good Manufacturing Practices Policy." (Tr. 78; IQX 3.)

that area; but as soon as it was discovered, the chair was removed.” (Tr. 104.) I also found that Mr. Gonzalez raised concerns about bumping his head, and was subsequently given a hard hat by Cindy, the Production Lead. Giving Mr. Gonzalez a hard hat was “an appropriate response.” (Tr. 104-05.) However, Mr. Gonzalez was yelling at Cindy, and that is not an appropriate way to address a coworker. (Tr. 106.)

January 7, 2014

There were not any contamination concerns brought to Cindy’s attention. I found that there was “no possibility of cross-contamination” in the hopper because the same product had been running prior to Mr. Gonzalez’s shift. (Tr. 106.) “There was continuous insubordination [by Mr. Gonzalez] as far as taking direction from the lead.” (Tr. 107.)

“There was a forklift in the area that Mr. Gonzalez was working in. But Lori Adler, a fellow worker, had provided some information that although it was in the area, there was more than enough room for the job to be completed.” Mr. Gonzalez yelled at Lori Adler to call Dawn, which is not appropriate. (Tr. 107.)

January 8, 2014

MSG requires workers to wear gloves in a production area. (Tr. 107.) MSG also requires workers to remove gloves and place them in the garbage when leaving that production area. Workers are required to get a new set of gloves when they return to the production area. (Tr. 108.) It is a big deal to take gloves into the bathroom at MSG because of the risk of cross-contamination. (Tr. 109.) I received information from a coworker of Mr. Gonzalez, Richard Schutten, and Cindy Norem regarding the events of January 8. (Tr. 115.) On January 8, Richard was in the restroom when someone came in and threw a pair of gloves on the ground towards Richard’s stall. (Tr. 108, 111-12.) Cindy was in the hallway outside the restroom at this time. When Richard left the restroom, he asked Cindy who had come out of the restroom. Cindy told him that it was Mr. Gonzalez. (Tr. 108.)

The decision to terminate Mr. Gonzalez was not an HR decision at my level. (Tr. 115.) I received information from Dan Waite, Quality Manager at the time; Cindy Norem; and Dawn Kikendall regarding the decision to terminate Mr. Gonzalez. (Tr. 114.) Mr. Gonzalez was terminated for violating GMPs and for being confrontational. Mr. Gonzalez was not terminated for complaining about cross-contamination or safety issues. (Tr. 109.)

Cynthia (“Cindy”) Norem (Tr. 124-164.)

I am a Production Lead at MSG, which means that I train new employees by “telling them how to do the specific job tasks that they are asked to do.” I have been a Production Lead for about two years. (Tr. 125.) I report to Dawn Kikendall. (Tr. 126.) Before becoming a Production Lead, I was a Production Line Worker. (Tr. 125-26.) During my time as a Production Line Worker I became familiar with all the different stations around the plant

I am familiar with Mr. Gonzalez. Mr. Gonzalez worked on three different lines at the plant. (Tr. 126.) “I found him to be disrespectful, dishonest, argumentative” from the beginning of his employment. It was my job to place Mr. Gonzalez on a line. (Tr. 127.) The workers rotated, at each break, to different tasks on the line. (Tr. 127-28.)

January 6, 2014

I am familiar with the area that Mr. Gonzalez was working on January 6. (Tr. 128.) It was Line 12. (Tr. 147.) There were four employees in the room that day. (Tr. 148.) Nora House was there, but I don't remember specifically who the other two employees were. (Tr. 149.) I keep track of that information daily, but “a person doesn't stay in a line for the entire time that they are there. They move to different lines.” (Tr. 149-50.) It is possible to have six employees working in that room, maybe seven. (Tr. 151.) “There is a filler that the people scoop powder into the hopper. It rises up through the auger and goes down to the filling machine. There's a person there filling the bags. From there, it goes from being filled to being scaled.” (Tr. 128.) The worker who has filled the pouch, wearing gloves, carries the bag to the scale, where the worker weighs it and adds or removes powder to get to the correct weight. (Tr. 129.) Next, the worker inserts a scoop and then the bag gets sealed. (Tr. 129-30.) One worker could perform the tasks of filling through sealing the pouches. (Tr. 130.) However, the next steps must be undertaken by a separate worker. That worker, not wearing gloves, boxes the bags, puts the boxes through a tape machine, and puts the boxes on a pallet. (Tr. 130-31.) Mr. Gonzalez would not have been assigned to fill pouches and put pouches in the box at the same time. (Tr. 132.) “I think that [Mr. Gonzalez] thought he was asked to fill pouches and then box at the same time, but . . . “[t]hat was not the case.” I had asked Mr. Gonzalez to fill and scale the bags only. (Tr. 143.) I thought that he understood what he was expected to do when I made the assignment. However, he must have misunderstood. He did not at any time do both the scaling and boxing. (Tr. 144.) I am not familiar with fumigated boxes; MSG does not have fumigated boxes around the plant. (Tr. 132.) Mr. Gonzalez did not mention any fumigation concerns to me. (Tr. 134.)

The worker filling the pouches can sit in a chair if enough workers are present so that he does not have to perform the tasks of filling, scaling, and sealing. (Tr. 132.) However, we were a little short-staffed on January 6, so it would not have been a good idea for Mr. Gonzales to have used a chair, because he was supposed to do both the filling and the scaling. (Tr. 132-33.) I removed the chair that was in the room when I started the day, because it would have been in the way. Mr. Gonzalez told me that he didn't understand why he couldn't have the chair. I told him, “The chair is not necessary. You're going to need to be putting the bags over here, and it would just be in the way.” (Tr. 133.) He argued with me a lot, and was “angry that I took the chair out.” (Tr. 133-34.) Mr. Gonzalez also mentioned a concern about bumping his head. There is a bar where he might bump his head, but he would “have to go a little bit out of his way to hit it.” In response, I gave Mr. Gonzalez a hard hat. Mr. Gonzalez was satisfied with that response; he put the hard hat on and wore it. (Tr. 134.)

On January 6, I told Dawn that Mr. Gonzalez was being disrespectful. However, Mr. Gonzalez “was not taken to the conference room on January 6.” (Tr. 155.) Mr. Gonzalez wore a

facemask respirator while working on Line 12, and spoke to me while wearing it. However, I could hear him clearly through the respirator. (Tr. 161.)

January 7, 2014

The room that Mr. Gonzalez was in on January 7 was a different room, although the worker's procedure is similar. Mr. Gonzalez did not complain to me about a dirty hopper on January 7. He did not tell me that we had to wait and clean the hopper. (Tr. 135.) MSGX 8 is a production report that shows the dates that products were run on specific lines. The data is inputted the same day that we do the run; it is MSG's practice to make this report in the normal course of business. (Tr. 136.) The report shows that Mr. Gonzalez was working on Line 3 on January 7. The report also shows that the product running on Line 3 at that time was Phase 8 Chocolate, 10-pound bags, and that nothing was run on Line 3 the day before. All shifts ran the chocolate bags on January 7. (Tr. 137.)

There was also an issue involving a forklift on January 7. (Tr. 137.) Mr. Gonzalez was wrapping pallets. (Tr. 137-38.) A pallet is about eight feet by ten feet, and weighs 500 to 600 pounds. A worker uses a pallet jack to pull the load up a ramp onto the pallet wrapper, takes the jack off, and then pushes a button to wrap the pallet. The worker removes the pallet from the wrapper by pushing the pallet jack back up to the pallet and pulling the pallet off. (Tr. 138.) There was a forklift in the area that Mr. Gonzalez was working. (Tr. 138-39.) It did not interfere with access to the pallet wrapper. I learned of the forklift issue when I heard Mr. Gonzalez yelling at another employee, Lori Adler. (Tr. 139.) "I saw Mr. Gonzalez arguing with Lori Adler" and went to find out what the problem was. (Tr. 157-58.) Mr. Gonzalez did not bring me to the stretch wrap to show me what he was concerned about. (Tr. 157.) Mr. Gonzalez thought the forklift was in the way of the pallet wrapper. (Tr. 139.) He did not tell me that he had tripped by the forklift. (Tr. 140.) I did not think the forklift was in the way; there was plenty of room to wrap the pallet, so the forklift did not get moved. (Tr. 139, 140, 157, 159.) I tried to calm Mr. Gonzalez down. He did "calm down a little bit," and continued to wrap pallets. (Tr. 140.)

Mr. Gonzalez did not express concerns other than what was just discussed: scaling and boxing at the same time, bumping his head, and the forklift being in the way. (Tr. 144.) Mr. Gonzalez never complained to me about poor ventilation in the plant. (Tr. 142.) If an employee had a concern about contamination or safety, I would listen to the employee and address the concern if I could. (Tr. 145.)

January 8, 2014

On January 8, Mr. Gonzalez was assigned to Line 4. (Tr. 161-62.) I was watching other lines that day. I do not recall if Mr. Gonzalez was wearing gloves that day. If he had been stacking boxes, gloves would not have been necessary. (Tr. 162.) Later, when I was giving an employee a tour I was in front of the bathroom for about a minute. (Tr. 140, 164.) I saw Mr. Gonzalez go into the bathroom. (Tr. 163.) Later, I saw Mr. Gonzalez come out of the bathroom. (Tr. 140.) Then, I saw Richard Schutten, another employee, come out of the bathroom. (Tr. 163-64.) Richard approached me to ask who had been in the bathroom. (Tr. 140.) I did not see

anyone other than Mr. Gonzalez and Richard exit. (Tr. 163-64.) Richard “mentioned to Dawn that there was an issue with the gloves.” (Tr. 140.) Later, I was asked to bring Mr. Gonzalez to the conference room. I remained in the conference room for the meeting. Dan Waite and Dawn Kikendall were also present. (Tr. 141.) Dan and Dawn talked to Mr. Gonzalez about leaving gloves on the bathroom floor. (Tr. 141, 142.) Mr. Gonzalez said that he did not leave gloves in the bathroom, and that he throws gloves away if he sees them on the floor. Dan left, and when he came back, he reported that he went to the men’s bathroom and saw a pair of gloves in the bathroom stall. Mr. Gonzalez was then terminated. (Tr. 141.)

Mr. Gonzalez was terminated for violating GMP policy by “throwing his gloves on the floor.” In any line, a worker is required to dispose of gloves before going to the bathroom. “You don’t leave with your gloves on,” and you are required to throw the gloves away in that room. (Tr. 145.) Mr. Gonzalez was not terminated for expressing his concern about contamination on January 6; for telling me he was worried about bumping his head; or for telling me he thought the forklift was in the way. (Tr. 145-46.)

Dawn Kikendall (Tr. 164-211.)

I have been the Production Manager at MSG for about a year. Before that, and during the time that Mr. Gonzalez worked at MSG, I was the Production Supervisor. As Production Supervisor, I oversaw “all the production leads and the production lines.” (Tr. 165.) MSG gives orientation to new employees, which covers safety, forklift training, GMP, and good documentation. MSG covers GMPs “pretty intensely.” We give every employee a packet with our GMP policy, and the employee must verify that he understand it. (Tr. 166.) IQX 2 is the GMP policy that was in effect at MSG when Mr. Gonzalez worked at the plant. One of the listed categories, Handwashing, Hand Sanitation, and Glove Use, is important at MSG in order to avoid contaminating the product. (Tr. 167.) The GMP policy that requires employees not to wear gloves in non-GMP areas such as lunch rooms, restrooms, and office areas is in place to prevent employees from forgetting to change their gloves after they have been contaminated in those areas. “We want them to be removed before they leave the line; go do what they need to do; hand wash; sanitize; come back to the area; and put new gloves on.” MSG focuses extensively on clean hands and clean gloves. MSG inspects its plants internally “every day, all day long.” (Tr. 168.) External inspections occur once or twice a year. We tell employees to report possible contamination issues “immediately, so we can address the situation and take care of it.” We also tell employees to report possible unsafe working conditions “immediately, so we can take care of everything.” (Tr. 169.)

Normally, there is not an area to sit at any of our production lines. However, when the first shift came in on January 6, 2014 there was a stool. (Tr. 169.) Cindy Norem removed the stool because if the stool was there, the person at the stool would be confining himself “to that one position instead of helping” others. (Tr. 169-70.) Cindy told me that she removed the stool because she wanted Mr. Gonzalez to help in other areas, and that Mr. Gonzalez was not “real happy about the stool being removed because the opposing shift had had it there.” (Tr. 170.) “I did not personally talk to him” about that incident. (Tr. 170, 184.) “The leads are direct contacts with the employees. I only get involved if need be.” (Tr. 187.) “I only have things brought to

my attention if it's something that I need to handle that they cannot handle." I do not personally give warnings or reprimands to the line workers; the leads do that. (Tr. 188.)

I was also informed by Cindy that Mr. Gonzalez had an argument with Lori Adler over a forklift. (Tr. 192-96.) And, although I did not document it, from December 11, 2013 to January 5, 2014, "I was informed of multiple different conversations that were taking place with [Mr. Gonzalez] with the lead in regards to issues with aggressive behavior." (Tr. 189.)

On January 8, "an operator [Richard Schutten] brought it to our attention that [Mr. Gonzalez] was using the bathroom facilities and . . . a pair of gloves hit the floor under the stall wall next to him." (Tr. 170.) Richard Schutten saw Cindy in the hallway. Richard then found me and I asked Cindy "who had left that bathroom at that period of time, and that's when she related that it was Johnny Gonzalez." This kind of violation is something I would expect an employee to report because it "shows that an employee just went from their workstation with their gloves into that area and [threw them] on the floor. It's unsanitary." (Tr. 171.) "I am not aware of where [Mr. Gonzalez] was working at the time. But all our lines at some point require you to have gloves on." (Tr. 200.) A palletizer would not have to wear gloves while working. However, palletizer is "a rotating position, so multiple people would be in that position throughout the day." (Tr. 201.)

After learning of the incident I spoke with Sarah Lewis, our HR Liason, and Dan Waite, who was our Quality Manager at the time and also "head[ed] up a lot of GMPs, sanitation, those kinds of things." "We discussed the situation and how we wanted to handle it." (Tr. 171.) After that discussion we had Cindy bring Mr. Gonzalez into the conference room so that we could discuss what took place. We asked Mr. Gonzalez to tell us his side of the story. Mr. Gonzalez told us that "he had not done it." After that, Dan went to the bathroom and found gloves on the stall floor, and no gloves in the garbage can. When Dan came back he began questioning Mr. Gonzalez about whether he put the gloves in the garbage can. Mr. Gonzalez said that he "would always put them in the garbage can" and that the gloves were not his. We informed Mr. Gonzalez that we would no longer be needing his services. (Tr. 172.) Mr. Gonzalez's reaction to that was "very argumentative, very aggressive, very, very denying to the point where Dan had let him know that . . . we would be ending his services with us, and that I had to repeat it and let him know that it would be ending." Mr. Gonzalez was terminated for being "very argumentative with employees and staffing, and breaking GMP policy." We explained that to him before he was escorted out. (Tr. 173.) Mr. Gonzalez never told me that there was a conspiracy or vendetta against him and that's why he was terminated; "that discussion never occurred." (Tr. 204.) We did not save the gloves; "we did not feel there was a reason to save them." (Tr. 208.)

Other employees have violated the policy against leaving a production area with gloves. It rarely happens, but usually we will coach the employee for an initial violation and explain why they should not be leaving the area with gloves on. "But if it's repetitive, then disciplinary action is taken." In this case, violation of the glove policy "was a piece of the termination." He was confrontational throughout. Everything "built up." (Tr. 209.)

There are different ways that we clean a room. (Tr. 175-76.) There are dry cleans, allergen cleans, customer cleans, and flavor cleans, each used in different circumstances. (Tr.

176.) For a flavor clean, everything is removed from the room, the system is drained, blown out, and swabbed. When “the swab passes, you document it.” For an allergen clean, everything is removed from the room, and the room is cleaned from ceiling to floor, including walls and machinery. (Tr. 177.) The hoppers are not removable; they are emptied by the operator of the filler. (Tr. 178.)

The smoothie room runs a smoothie that is an off-white color until something is added to it. (Tr. 179.) The way that the smoothie room is cleaned “depends on the product and the cleaning required to change from that product to the next.” (Tr. 180.) I do not believe that there was cross-contamination occurring in the facility on January 7. (Tr. 198.) Based on the production report (Exhibit A), I believe that we ran Phase 8 Chocolate on Line 3 on Tuesday and that Line 3 was not run on Monday. (Tr. 198-99.)

Exhibits

MSGX 1: MSG Statement of Position, February 17, 2014

Dana Finn testified that she prepared this exhibit after conducting an investigation ending on February 17, 2014. (Tr. 102, 103, 110.) The Statement of Position acknowledges that Mr. Gonzalez met with Dawn Kikendall on January 6, 2014. During that meeting

Dawn Kikendall . . . confirmed that during the follow up conversation with Mr. Gonzalez she did agree to the fact that Mr. Gonzalez was to be completing specified tasks while one bag was auto filling, that he shouldn't be deciding what to do on his own, and he should do what he was asked to do. Contamination concerns were never brought to Dawn's attention by Mr. Gonzalez.

The Statement of Position also asserts that MSG had trouble placing Mr. Gonzalez at tasks on January 7, 2014. It states:

Mr. Gonzalez was assigned to a number of different jobs during the day because he continued to behave disrespectfully towards the leads and other team members. MSG hoped to find an area for Mr. Gonzalez to work in which he could work well with others and unfortunately, he created disharmony in each area he was asked to work.

The Statement of Position gives a detailed account of the discussion in the conference room that ended in Mr. Gonzalez's discharge:

Mr. Gonzalez stated that he fully understood GMPs because he had worked in production a long time and that if he saw hairnets or gloves on the ground, he would pick them up and put them in the garbage. Dan asked Mr. Gonzalez if he had taken off his gloves and thrown them in the restroom garbage when he walked in there, and he responded, “yes.” While Dawn and Cindy stayed in the conference room with Mr. Gonzalez, Dan put gloves on and went into the restroom to search the garbage for Mr. Gonzalez's gloves. Dan stated there were

no gloves in the garbage, but there were in fact a pair on the floor in one of the stalls. Dan returned to the conference room and asked Mr. Gonzalez if he saw the gloves on the floor when he was in the restroom, Mr. Gonzalez answered “yes.” Dan then reconfirmed that even though Mr. Gonzalez previously stated that when he saw hairnets or gloves on the ground he picked them up and put them in the garbage; but he did not in fact do so for this occasion, nor were there any gloves in the restroom garbage. Dawn stated that during the entire discussion Mr. Gonzalez kept arguing with her, Cindy and Dan and that he was confrontational. At that point in time, Dan walked Mr. Gonzalez to the locker room to gather his items, and shared that Mr. Gonzalez stated the following, “I could outwork any of these young kids, but the three bitches had a conspiracy against me and that’s why I’m getting fired.”

MSGX 1 also includes a copy of the email sent to IQ informing it that Mr. Gonzalez had been terminated. The Statement of Position emphasizes that

another temporary employee whose name is shaded out for confidentiality purposes was also asked to leave for not following GMP policies and performance issues. This supports the fact that MSG was not retaliating against Mr. Gonzalez for his alleged claims of contamination concerns, but for valid performance and quality issues and the Company handled other employment situations similarly.

MSGX 3: Mr. Gonzalez’s Statement to OSHA

Mr. Gonzalez’s statement describes meeting with Dawn Kikendall in the conference room on January 6, 2014:

I was wearing my respirator . . . that day. I still had my respirator on when I was talking to Cindy. A short time later I was escorted to the conference room where Dawn told me that Cindy said I was being disrespectful. I responded that Cindy probably could not hear me correctly through the respirator. I then informed Dawn about my concerns with the possible cross contamination. Dawn agreed that I should not be doing the assigned tasks.

The statement also describes Gonzalez’s dismissal on January 8, 2014:

I went to the restroom then returned to my job to start cleaning the area. Cindy again escorted me to the conference room. Dawn informed me that two witnesses said they saw [me] throw [my] gloves on the floor in the bathroom, washed [*sic*] [my] hands and walk away. It was considered a serious offense, so I was terminated.

CX 4: Cellular Phone Bills

CX 4 is comprised of two cellular phone bills from U.S. Cellular, dated February 7, 2014 and January 10, 2014. The bill reflects calls to IQ at 920-738-0020 on December 9, 10, and 12,

2013 and on January 8, 2014. Calls recorded on the bill range in date from December 5 to December 23, 2013; and January 7 to February 3, 2014.

Applicable Law

The FDA Food Safety Modernization Act of 2011 (“FSMA”), Pub. L. No. 111-353, 124 Stat. 3885 (codified in scattered sections of 21 U.S.C.) amended provisions of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1938). The FSMA is considered the first comprehensive reform of food and drug safety laws in the United States in 70 years and, among other provisions, adopted a whistleblower protection provision that contained procedural and remedial protections for whistleblowers in the food industry. The relevant provisions of the FSMA provide:

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(a). An employee’s reasonable belief that conduct is prohibited is a question of fact based on the totality of circumstances; whether the conduct at issue in fact violated the FSMA is not dispositive. *Chase v. Bros. Int’l Food Corp.*, 3 F. Supp. 3d 49, 54-55 (W.D.N.Y. 2014).

Like other recently enacted reform statutes containing whistleblower protections, Congress placed the responsibilities for the exercise of the substantive protections in the FSMA with the particular agency with relevant regulatory expertise, while placing the authority for

implementing whistleblower regulatory protections against retaliation of food sector employees with the Secretary of Labor. *See* 29 C.F.R. Parts 18 and 97. Accordingly, the Food and Drug Administration (“FDA”) of the Department of Health and Human Services (“HHS”) has the responsibility for drafting and implementing the actual governing food safety regulations and structure, while the Department of Labor (“DoL”) has the authority to issue rules and regulations implementing the whistleblower protection provision of the Act. In addition, however, because responsibility for regulating food safety has traditionally been shared with other federal agencies as well as with the states and local public health authorities, and also involved international agreements, the FSMA incorporated recognition and preserved the regulatory authority of these various jurisdictional forums. *See* 21 U.S.C. § 2251-52.¹³

The DoL regulation sets forth the requirements for the content of the decision and order of the administrative law judge, and includes the standard for finding a violation under the FSMA. Specifically, the complainant must demonstrate (i.e., prove by a preponderance of the evidence) that the protected activity was a contributing factor in the adverse action. If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. *See* 21 U.S.C. § 399d(b)(2)(C); 29 C.F.R. § 1987.

As with the other recent “contributing factor” statutes, 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 Pac. R.R. Co.*, ARB No. 13-034, slip. op. at 11, 29 (ARB March 20, 2015); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 689-91 (7th Cir. 2009) (discussing *Marano* as applied to analogous whistleblower provision in the ERA); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)).

Findings of Fact and Conclusions of Law

In the following section I find that: (i) MSG and IQ are employers and Mr. Gonzalez is an employee under the FSMA; (ii) Mr. Gonzalez engaged in protected activity on January 6, 2014; (iii) adverse action was taken against Mr. Gonzalez by MSG on January 8, 2014; (iv) the protected activity was not a contributing factor in the adverse action; and (v) the adverse action would have been taken in the absence of Mr. Gonzalez’s protected activity.

¹³ DoL’s responsibility for receiving and investigating whistleblower reprisal complaints under the FSMA has been delegated to the Assistant Secretary for Occupational Safety and Health (“Assistant Secretary”). Secretary of Labor’s Order No. 1-2012 (Jan. 18, 2012), 77 Fed.Reg. 3912 (Jan. 25, 2012); Interim Final Rule Procedures for Handling Retaliation Complaints Under Section 402 of the FDA Food Safety Modernization Act (Feb, 13, 2014), Section 1987.102 Obligations and Prohibited Acts, 79 Fed.Reg. 8619; 29 C.F.R. 1987. *De novo* hearings on objections to the Assistant Secretary’s findings are conducted by OALJ and appeals from those decisions are decided by the Administration Review Board (“ARB”). Secretary of Labor’s Order No. 2-2012 (Oct. 19, 2012), 77 Fed.Reg. 69378 (Nov. 16, 2012); 79 Fed. Reg. 8619; 29 C.F.R. 1987.

Mr. Gonzalez Is an Employee And MSG and IQ Are Employers

The parties have agreed that under the FSMA (i) Complainant was an employee of both MSG and IQ at the relevant times,¹⁴ and (ii) MSG and IQ are both employers in this matter.¹⁵ The record supports these stipulations.

Mr. Gonzalez Engaged in Protected Activity on January 6, 2014

Mr. Gonzalez is neither a scientist, a lawyer, nor a hygienist, nor does he belong to some other profession requiring highly technical or sophisticated training or an academic background. However, Mr. Gonzalez was given fairly extensive training by MSG on GMPs and allergen awareness before performing various food-handling tasks at MSG. (IQX 4, 5.) It is evident from the FDA regulations and guidance that a critical point in the process is the handling of food items. 21 U.S.C. §350g(c)(3) provides that preventive controls should be in place to insure that “food manufactured, processed, packed, or held . . . will not be adulterated.” Food that “has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health” is considered to be adulterated. §342(a)(4). Preventive controls are defined as

risk-based, reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ to significantly minimize or prevent the hazards . . . that are consistent with the current scientific understanding of safe food manufacturing, processing, packing, or holding at the time of the analysis.

21 U.S.C. § 350g(o)(3). Current GMPs enumerated in the regulations are specified as a type of preventive control. § 350g(3)(F).

The FSMA’s protections apply to Mr. Gonzalez, who was responsible for handling food products at MSG, a function for which he received training regarding GMPs. Mr. Gonzalez alleged that on January 6, 2014 he expressed concerns of cross-contamination to his employer regarding his perceived assignment of both filling and boxing pouches. Ms. Norem’s testimony confirms that Mr. Gonzalez raised issues with her regarding the tasks he thought he was supposed to perform. (Tr. 143.) Mr. Gonzalez never articulated nor identified a specific violation of the FSMA or food safety law generally.¹⁶ However, the law does not require a claimant to identify to his employer a specific order, rule, regulation, standard, or ban under the

¹⁴ The Complainant was clearly an employee of MSG and IQ at the time of the alleged retaliation as demonstrated by the facts in evidence. *See* MSGX 1 attachment B (email from MSG to IQ regarding termination of Complainant); CX 1 (Employee Plant Schedules for MSG); IQX 9 (notes on calls between Complainant and IQ regarding Complainant’s employment); and Tr. 97 (Senior Staffing Consultant at IQ stating that Complainant was paid by IQ while working at MSG).

¹⁵ A covered employer under the FSMA is an “entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 21 U.S.C. § 399d(a). MSG “produces proteins used in the food industry” and IQ “is an employment staffing firm providing supplemental labor to [MSG] to augment [MSG’s] own work force.” (IQ Post-Hearing Brief at 1.)

¹⁶ Nor did he identify any order, rule, regulation, standard, or ban.

FSMA to claim protection under the Act's whistleblower provisions. *See, e.g., Chase v. Bros. Int'l Food Corp.*, 3 F. Supp. 3d 49, 54-56 (W.D.N.Y. 2014).

I find that Mr. Gonzalez subjectively believed that his procedure of both filling and boxing pouches on January 6, 2014 was in violation of the FSMA, and that he raised his concern with Ms. Norem. Additionally, although both Ms. Norem and Ms. Kikendall deny that Mr. Gonzalez was taken to the conference room on January 6 to meet with Ms. Kikendall, I find that this meeting took place. MSG's Statement of Position, MSGX 1, acknowledges that Ms. Kikendall met with Mr. Gonzalez and that the two discussed Mr. Gonzalez's disrespectful behavior and his assigned tasks. It is not clear that either Ms. Norem or Ms. Kikendall realized that Mr. Gonzalez's concern with his job that day related to cross-contamination. It is likely that complaints of cross-contamination registered as part of his displeasure over his assigned task. He had already become angry over not being able to sit and had expressed worry that he could bump his head. Additionally, it was Mr. Gonzalez's perception that he was taken to the conference room for being disrespectful to Ms. Norem, not because of cross-contamination concerns. *See* MSGX 3. However, I find that Mr. Gonzalez communicated to Ms. Norem and Ms. Kikendall that he objected to doing both tasks of filling and boxing pouches. The FSMA requires only that an employee object to an activity because he reasonably believes it to be in violation of the FSMA. It does not require an employee to be articulate in his voicing of those concerns. *See* 21 U.S.C. § 399d(a)(4).

A reasonable person with Mr. Gonzalez's education, experience, and training in food handling techniques would have found that filling and boxing pouches would violate GMPs and the FSMA. The tasks of filling, weighing, and sealing the pouches requires gloves to be worn; the task of boxing the pouches does not. (Tr. 128-31.) The GMP policy that new workers are given emphasizes preventing product contamination and cites FDA rules. *See* IQX 4, 5; Tr. 77-79. A reasonable worker at MSG would have believed that the tasks Mr. Gonzalez had undertaken could result in contamination. Consequently, I find that Mr. Gonzalez engaged in protected activity under the FSMA.

Mr. Gonzalez's Other Concerns Are Not Protected Activities Under the FSMA

I find that Mr. Gonzalez's five other employment concerns, though they may be well-founded, were not protected activity under the FSMA. In his testimony, Mr. Gonzalez raised four concerns about workplace safety: (i) poor ventilation, (Tr. 35, 36); (ii) an inadequate method of unloading trailers with hand jacks, (Tr. 216-17); (iii) a dangerous obstruction caused by a forklift, (Tr. 39-40, 217); and (iv) a head injury hazard caused by a low ceiling and the lack of a chair, (Tr. 214). The FSMA focuses on food, rather than workplace, safety. Although Mr. Gonzalez may have subjectively believed that these issues were in violation of the FSMA, a reasonable person with Mr. Gonzalez's education, experience, and training in food handling techniques would not have found the workplace safety concerns to implicate food safety concerns, GMPs, or the FSMA. Consequently, I find that Mr. Gonzalez did not engage in protected activity under the FSMA when he voiced workplace safety concerns.

Finally, Mr. Gonzalez's concerns about cross-contamination occurring on January 6¹⁷ and January 7, 2014¹⁸ were not protected activity. It is undisputed that Mr. Gonzalez did not communicate these concerns to anyone until after he was terminated. *See* Tr. 38. Therefore, Mr. Gonzalez's unexpressed concerns fall outside of the FSMA, which requires that an employee "objected to, or refused to participate in" the conduct in order to qualify as protected activity. 21 U.S.C. § 399d(a)(4). Since Mr. Gonzalez never communicated this concern with his employer or refused to perform any associated tasks, his worry falls outside the protection of the FSMA regardless of its merit.¹⁹

MSG Took Adverse Action Against Mr. Gonzalez on January 8, 2014

I find that MSG took adverse action against Mr. Gonzalez by terminating his employment on January 8, 2014. The FSMA explicitly defines termination of an employee as an adverse action, stating that no covered entity "may *discharge an employee* or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment" because the employee has engaged in protected activity under the act. 21 U.S.C. § 399d(a) (emphasis added). It is undisputed that Mr. Gonzalez's employment with MSG was terminated.²⁰

IQ Did Not Take Adverse Action Against Mr. Gonzalez

I find that IQ did not take adverse action against Mr. Gonzalez on January 8, 2014, or at any point afterwards. Mr. Gonzalez's employment with MSG ended at MSG's request. The January 8, 2014 email from MSG alerting IQ of Mr. Gonzalez's termination states that MSG "asked Johnny Gonzalez to leave . . . due to not following GMP policy and being disrespectful towards other team members/leads." (IQX 10.) IQ did not have decision-making authority over whether Mr. Gonzalez was retained as an employee by MSG.

Additionally, although Mr. Gonzalez was terminated from his position at MSG, Ms. Rohloff testified for IQ that Mr. Gonzalez remained an employee afterwards. I find that Mr. Gonzalez was not placed in a new position because he did not request a new position. Although Mr. Gonzalez contends that he contacted IQ on January 6, 2014 to request a new assignment, neither IQ's call logs nor Mr. Gonzalez's phone records corroborate that assertion. Even if IQ took adverse action towards Mr. Gonzalez by not placing him in a new position, there is no evidence that such action was taken as a consequence of Mr. Gonzalez's protected activity. Any such action would have been the result of the complaints communicated to IQ by MSG: that Mr.

¹⁷ *See* Tr. 35, 36. Mr. Gonzalez stated that the door was left open because the ventilation was not working, and that the open door "contaminated the room."

¹⁸ *See* Tr. 37-38, 215. Mr. Gonzalez stated that he believed the room was not cleaned properly between products.

¹⁹ In the event that Mr. Gonzalez's January 7, 2014 cross-contamination concern qualifies as protected activity, it could not have contributed to adverse action taken by Mr. Gonzalez's employers because it was never communicated to them.

²⁰ MSG does not dispute that it terminated Mr. Gonzalez's employment, yet disputes that the termination was adverse action within the meaning of the FSMA because protected activity on the part of Mr. Gonzalez did not factor into MSG's decision to discharge him. I reject MSG's argument. The determination of whether an employment decision constitutes adverse action is distinct from determinations of (i) whether protected activity was engaged in; and (ii) whether protected activities were a contributing factor to the adverse action.

Gonzalez failed to follow GMP policy, was disrespectful, and was confrontational. I find that IQ had no knowledge of Mr. Gonzalez's protected activity. Although Mr. Gonzalez contends that he called IQ on January 6, 2014, the call logs begin on January 7, 2014, and so do not document a call to IQ. Additionally, I credit Ms. Rohloff's testimony that it is the practice of IQ to log all incoming calls from employees, and that to her knowledge Mr. Gonzalez did not call on January 6, 2014. IQ's database notes support Ms. Rohloff's contention. Logged calls from Mr. Gonzalez begin on October 15, 2013 and end January 16, 2014. There is no entry on January 6, 2014, and none of the entries include information about cross-contamination concerns, Mr. Gonzalez's protected activity. (IQX 9.)

*Mr. Gonzalez's Protected Activity Was Not a
Contributing Factor in Adverse Action Taken by MSG*

I find that Mr. Gonzalez was terminated because of his disrespectful, aggressive behavior, and confrontational demeanor. On January 6, Mr. Gonzalez was confrontational and angry with his direct supervisor, Ms. Norem, when she told him he would not be permitted to use a chair. *See* Tr. 133-34, 214. On January 7, Mr. Gonzalez yelled at Lori Adler and was confrontational with Ms. Norem when he discussed the placement of a forklift. *See* Tr. 139, 157-58, 217, 40. By his own admission, Mr. Gonzalez was "pointing fingers to them." (Tr. 40.) Finally, I find MSG's assertions that Mr. Gonzalez was difficult to place because he "created disharmony in each area he was asked to work"²¹ are credible given the incidents discussed.

I find that Mr. Gonzalez was also terminated because of his perceived failure to follow GMP policy. Based on information from Richard Schutten and Ms. Norem, MSG had sufficient reason to believe that Mr. Gonzalez disposed of gloves on the restroom floor, a violation of the GMP policy provided to employees during orientation. It is not necessary to decide whether or not Mr. Gonzalez actually disposed of gloves improperly. MSG demonstrated that they had a well-founded belief that Mr. Gonzalez violated GMP policy. Mr. Gonzalez acknowledged in his OSHA statement that disposing of gloves in a non-GMP area "was considered a serious offense, so I was terminated."²²

The above incidents document that Mr. Gonzalez's attitude towards others at MSG had become an issue, and that management believed that he had violated GMP policy. It may be that Mr. Gonzalez was treated unfairly in those situations. However, it is not relevant whether Mr. Gonzalez was at fault because those activities do not constitute protected activity under the FSMA. Additionally, even if the workplace safety concerns were found to be protected activities, the aggressive way in which Mr. Gonzalez voiced those concerns is not protected. The incidents document why MSG was unhappy with Mr. Gonzalez, and form the basis for MSG's decision to terminate Mr. Gonzalez's employment.

²¹ *See* MSGX 1.

²² Implicit in much of Mr. Gonzalez's testimony and in his statement to OSHA was Mr. Gonzalez's belief that his termination had been the result of a misunderstanding over whether he had acted rudely or disposed of gloves improperly. Mr. Gonzalez described his termination as "but a total misunderstanding," and sought to explain why others wrongly interpreted his actions as aggressive. For example, Mr. Gonzalez asserted in his OSHA statement that Ms. Norem brought him to the conference room and told Ms. Kikendall that he was being disrespectful and goes on to imply that any yelling he had done was necessitated because his voice had been obscured by the respirator he had been wearing at the time. *See* MSGX 3.

Mr. Gonzalez's January 6, 2014 concern of cross-contamination was the result of a misunderstanding regarding the tasks that Mr. Gonzalez was assigned to perform. Mr. Gonzalez testified that the incident on January 6 was "taken care of" by a meeting with Ms. Kikendall on that day. (Tr. 36). Although both Ms. Kikendall and Ms. Norem deny that this meeting took place, it is unnecessary to resolve that particular dispute because I find, as both sides indicate, that Mr. Gonzalez's concerns about cross-contamination were resolved on that day. Additionally, both sides seem to indicate that the focus of the meeting on January 6, 2014 was Mr. Gonzalez's disrespectful behavior. *See* MSGX 1, 3.

I find credible the testimony of Ms. Kikendall and Ms. Norem regarding Mr. Gonzalez's demeanor. Ms. Norem's characterization of Mr. Gonzalez as "disrespectful, argumentative," (Tr. 127), is supported by Mr. Gonzalez's descriptions of the events at issue. Additionally, I find credible Respondents' assertion that Mr. Gonzalez was terminated for being "confrontational throughout" his employment with MSG and for violating GMP policy by improperly disposing of his gloves.

I find Ms. Kikendall's testimony that MSG is vigilant about GMPs credible. The orientation packets provide more evidence to that effect, detailing MSG's policies on GMPs and allergens, and documenting their efforts to educate their employees on those policies. *See* IQX 1, 3, 4, 5, 7. Ms. Kikendall's testimony, that new workers are often given warnings about leaving a production area with gloves before being terminated, does not militate against these findings. Ms. Kikendall describes "coaching" workers, explaining to them what is prohibited and why. *See* Tr. 209. MSG appears to give more leeway to workers who are unfamiliar with appropriate GMPs, and less to workers who know better. In this case, although he was a new worker, Mr. Gonzalez assured Ms. Kikendall and the others in the conference room that he was familiar with GMP policies, and even that it was his practice to dispose of any gloves that he happened to see on the ground. *See* MSGX 1, Tr. 172, 141. Therefore, it was not contrary to MSG's practices to discharge Mr. Gonzalez for improperly disposing of his gloves.

*MSG Would Have Taken the Same Action in
the Absence of Mr. Gonzalez's Protected Activity*

Even if MSG had been influenced by the fact that Mr. Gonzalez voiced concerns on January 6, 2014, I find by clear and convincing evidence that MSG would have taken the same adverse employment action in the absence of protected activity. The standard for clear and convincing evidence

requires adjudicators of whistleblower cases to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse action; and (3) the facts that would change in the "absence of" the protected activity.

Speegle v. Stone & Webster, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014).

As described in detail above, Ms. Norem and Ms. Kikendall recounted a number of serious incidents on January 6, 7, and 8 that would have resulted in Mr. Gonzalez's termination from employment even in the absence of protected activity. MSG has clearly demonstrated both its commitment to GMPs and the reasons that it was not satisfied with Mr. Gonzalez's performance at work.

Conclusion

I find that Mr. Gonzalez engaged in protected activity on January 6, 2014 and his termination from MSG on January 8, 2014 constitutes an adverse action under the FSMA. However, I find the protected activity was not a contributing factor in the adverse action. Assuming that the protected activity was a contributing factor in the adverse action, I find Respondent MSG has proven by clear and convincing evidence that it would have terminated Complainant regardless of the protected activity.

Order

The complaint for whistleblower protection under the FDA Food Safety Modernization Act filed by Johnny C. Gonzalez with OSHA on or about January 31, 2014 and appealed to this Office on July 3, 2014, is hereby DISMISSED.

SO ORDERED:

Stephen R. Henley
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

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).