



Issue Date: 08 June 2015

Case Number: 2014-FDA-00004

In the Matter of:

ELAINE HORTON,
Complainant

v.

CROSSMARK, INC.,
Respondent

Elaine Horton, Pro Se
For the Complainant

Michael H. Bell, Esq.
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

On or about May 30, 2013, Elaine Horton (“Complainant” or “Horton”) filed a formal complaint with the U.S. Department of Labor (“DoL”), Occupational Safety and Health Administration (“OSHA”), under Section 402 of the Food Safety Modernization Act (“FSMA”)¹, alleging that her former employer, CROSSMARK, Inc. (“Respondent” or “CROSSMARK”), retaliated against her by cutting her work assignments and hours in retaliation for complaining to management regarding the unsafe handling of food items by a co-worker. After conducting an investigation, the Assistant Secretary of Labor, acting through the Acting Regional Administrator, Region VII, Kansas City, Missouri, issued a final determination letter dated March 6, 2014, dismissing the complaint (ALJX1).²

¹ 21 U.S.C. §399d with implementing regulations at 79 Fed. Reg. 8619 Feb. 13, 2014). The FSMA was signed into law by President Obama on January 4, 2011.

² The following references will be used: “Tr.” for the official hearing transcript; “CX” for a Complainant’s exhibit; RX for a Respondent’s exhibit; and “ALJX” for an Administrative law Judge’s exhibit.

By letter dated March 11, 2014, Complainant filed objections to the Secretary's Findings with the Office of Administrative Law Judges ("OALJ"); (ALJX 2). On August 7, 2014, after being assigned to the case and issuing two pre-hearing orders (ALJX 3 and 4; Tr. at 21), I convened a formal hearing at the Charles Evans Whittaker Courthouse in Kansas City, Missouri, at which both parties were afforded a full and fair opportunity to present evidence and argument. At the hearing, Complainant offered forty-four exhibits. I accepted CX 1-2, and CX 4-43 with the exception of the final two pages of CX 30.³ Claimant withdrew CX 3. I also accepted RX 1-16. (Tr. at 62). Two witnesses, Complainant and Camille Hamilton, Complainant's immediate supervisor for the relevant period,⁴ testified at the hearing. The record remained open post-hearing for the submission of post-hearing briefs; they were received from both parties. In addition to back-pay, Complainant also seeks \$1500.00 in compensatory damages for emotional distress. (CX 2).

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 pertinent precedent. Although I do not discuss below every exhibit in the record, I carefully considered all the testimony and exhibits in reaching this decision.

Positions of the Parties

Complainant

Complainant worked as a Lead Event Specialist ("LES") for CROSSMARK, chiefly in two Lawrence, Kansas area Walmart stores, # 484 and #5219. She started in March 2010, drawing her first paycheck in April. (Tr. at 53; CX 4). She also worked in the same capacity in Topeka, Ottawa, and Leavenworth as well as in other Walmart stores. (CX 7, 24, 28). However, because they were closest to her home and she had served there as the LES for the longest time of any employee, she preferred the Lawrence stores. (CX 24). As LES, she was responsible for training Event Specialists in preparing foodstuffs, setting up food carts, serving customers, and cleaning up food events during which Walmart offered food samplings and demonstrations to store customers. (CX 25). She was also responsible for providing updates to supervisors on events at the store. She was certified in May 2010 as a Certified Professional Food Manager in "food service safety and sanitation". (CX 5, 15). Food serving events normally lasted six hours; they were scheduled at various times although the need was greatest on Wednesdays through Saturdays. The hours were variable and part-time. In addition to CROSSMARK events, Complainant handled events for other employers at Walmart. (Tr. at 52).

³ Tr. at 59 ; this resulted in the elimination of the text message log.

⁴ In its pre-hearing statement, Respondent also identified two possible additional witnesses – Jim Bernert and Barb Dixon. Neither testified. Respondent also identified in its pre-hearing statement a number of exhibits it intended to introduce, including the May 1, 2013 counseling warning it had given Complainant. (RX 6). Complainant identified some eighteen possible witnesses but did not request any subpoenas and she was the only witness appearing on her behalf. (CX 3) (withdrawn).

Complainant asserts that until the events at issue, she normally worked a schedule permitting her to work some 18 hours a week.⁵ She testified that an unwritten CROSSMARK rule was for the first three events in a pay period (of 6 hours or 360 minutes each) to be assigned to the LES. (Tr. at 120). Her base rate was \$11.00 per hour. (CX 4). Her W-2s for the years 2010 through 2013 for CROSSMARK were: \$8,271.57 (2010 – beginning in April); \$11,975.82 (2011); \$10,495.74 (2012) and \$3,462.00 (2013 – through June). (CX 6). She alleges that as a result of her complaining on and after March 2013 to her supervisors, and, chiefly, a new supervisor, Camille Hamilton, with regard to various health safety and cleanliness serving issues, particularly at Walmart Store #484, she was not permitted to work as many jobs or hours as she desired and her working hours were cut, adversely affecting her income. As noted above, Complainant presented evidence of her income from CROSSMARK for the first six months of 2013 as about \$3500.00 (or about \$7000.00 for the year) as compared with \$10,500 to \$12,000 for the two prior years. (Tr. at 20). She testified that she had previously complained about food safety, the performance of other employees, including their food handling practices, and not receiving enough jobs, as far back as November 2010, presenting e-mails in support of her testimony. (Tr. 54; CX 7-14, 16, 17, 19, 20, 21, 23, and 24). With each supervisor, she hoped the situation would improve. (Tr. at 55; CX 11). At various times, she referred her supervisors to Walmart store and department managers who had their own concerns about some of the CROSSMARK workers, which they shared with Complainant. (CX 17, 19). She communicated with her supervisors by text or cell phone. Because any one supervisor traveled around to different Walmart stores in the supervisor's region, they were not always available to speak about a problem with a specific food demonstration as it was happening. (CX 23).

Sometime around February 2013, supervisor Stephanie Haas left her position and was replaced by Camille Hamilton. Complainant was scheduled to train two new employees, Russell Montague and Carol Caro. Prior to actually meeting Hamilton, Complainant reached out to her, noting her availability for work at the two Lawrence stores and her failure to be scheduled for events during the week of February 21-24. (CX 24). Ms. Hamilton informed Complainant that the event count for the week of February 21-24 was low. (Id.). Complainant also informed Hamilton on March 2 that: she would not be available for assignment on March 14-17; had already notified and received approval for being off on that weekend; and whoever was handling demonstrations on those days could use her equipment in store #5219. (CX 26).

Complainant was scheduled to train Montague and Caro on March 2 and 3, 2013. (CX 28). Both assignments were scheduled for Walmart #5219. Complainant also expected to meet with Hamilton for the first time that weekend. (CX 25). Hamilton showed up on March 2 and met with Complainant and Montague. (CX 27). From Complainant's perspective, that initial meeting started a confrontation between the two women. (Tr. at 21-24; 45-47). First, there was difficulty finding the product that Complainant and Montague were supposed to demonstrate. Although they found the product and were demonstrating it at the time Hamilton arrived, Hamilton showed up with the product in hand stating that she did not understand why Horton

⁵ Complainant never cited to a specific number of hours she expected to work a week, but it was evident from both parties that the hours varied. In addition to her W-2s, Complainant provided some schedules of which employees were assigned to which stores (CX 7); however, based on the pagination, it is not clear that these schedules are complete. (Id.). CX 7 does reflect, however, that there were consistently more demonstrations at Store #484 than #5219.

had called the day before and stated that she did not have the product. Second, when Horton and Montague tried to explain the steps they had taken to find the product, Hamilton told her that she did not “want to discuss the matter anymore.” (Tr. at 24). Third, there was disagreement between Hamilton and the store managers as to the use of a washing station. (Tr. at 21). Fourth, Hamilton failed to identify and correct Montague on what Horton saw as unsanitary practices by him, resulting from his failing to follow Horton’s directions. (Tr. at 22).

In Complainant’s update to Hamilton by e-mail on March 3, she expressed concerns about poor cleanliness habits and the appearance of Russell Montague. (CX 27, 30; Tr. 25, 56) Specifically, Complainant expressed concerns that Montague was touching his head and his chest while handling food and had not worn a beard guard. While Complainant had complained about co-workers work habits and appearance previously, her complaints about the new employee specifically addressed hygiene issues relating to food products. She also informed Hamilton that Montague did not seem at all concerned about the feedback that she had given him with regard to washing his hands, wearing gloves, and a beard net, but “he just commented...that you had seen it all and hadn’t said anything to him so he wasn’t concerned about it”. Montague also told Complainant that he was not going to wear a beard net until Hamilton so instructed him. (CX 27). Complainant also informed Hamilton that her co-worker Christina Rogers also had concerns about Montague. Horton gave Hamilton positive feedback regarding the other new employee, Carol Caro.

On March 6, Hamilton posted a weekly schedule for upcoming Weeks 6 and 7 and noted that there were more events being scheduled. She also noted a requisition for a new hire in Lawrence store #5219. (CX 28). Among other updates, Hamilton noted the need for event feedback and provided notice that the company was sending auditors to the stores to evaluate the program. She reminded the employees of the importance of certain cleanliness procedures. On March 9, Horton confirmed her availability for events in the Topeka store for March 21 and 22 and provided Hamilton information on talking to various store managers about cart availability and other issues. On March 20, Hamilton informed Complainant that she would be in store #5219 the next day and would discuss the cart situation with store personnel then. (CX 29).

In a four-page April 2 e-mail that Complainant sent to Employee Relations, with copies to Jim Bernert, Regional Manager, Events (CX 2), Ms. Hamilton’s supervisor, and to Ms. Hamilton, Complainant thoroughly detailed her dissatisfaction with Montague’s work habits and also addressed “issues of Supervisory, CROSSMARK Management, #5219 & #484 Store Management Complaints and sanitation issues.” (Tr. at 32; CX 30). It is this note that Complainant testified principally precipitated retaliation resulting in a decrease to her work hours, particularly at the Lawrence stores, and a Counseling Memorandum to her dated May 1, 2013. (CX 33). The April 2 e-mail highlighted events from March 3 through March 30, detailing problems with lack of sanitation, hand-washing, washing facilities and lack of availability of sinks, and a dirty cart left behind by Montague.

Complainant also testified that she had previously sent Hamilton a note on the evening of March 3, identifying problems with the carts and Montague touching the hair on his head and chest as well as his refusal to wear a beard guard or wash his hands in response to Horton’s directions. She testified she believed that Hamilton’s response showed a lack of any concern.

Horton also noted in her April 2 e-mail that, on March 9, she and the Walmart store manager had discussed placement and use of the carts and that the manager stated that he always had the Event Specialist stand beside the triple sink and did not think that the hand washing station (“HWS”) should be used as it would not remain sanitary. She also stated that she had told Hamilton during the latter’s visit to store #5219 on March 3 (which she later corrected to agree with Hamilton that the date was March 2) that the HWS in the Topeka stores had not been maintained properly and Hamilton had replied that she didn’t see a problem with the “same water in the HWS for five or six months.” (CX 30). Complainant wrote that such a practice was not acceptable to her and that she would never use a HWS in that manner or work for a company that found such a practice acceptable. (*Id.*). Complainant testified that contrary to the store manager’s expressed desires, Ms. Hamilton instructed her to use hand washing stations rather than sinks and informed her that the Specialists could let the water stand in the hand washing stations for five to six months without changing it. (Tr. 22—23).

Horton noted in her April 2 e-mail that Hamilton came into Store #5219 on March 22, spoke with two Walmart managers, and in a text message to Horton March 23 “stated that she had also looked at both of the carts to examine them for damage” and “they looked fine but where [sic] maybe just a little disorganized. (CX 30 at page 1). When, on March 23, she had reported the poor conditions to Hamilton, the latter told her that she had visited the site on March 22, but only found the carts “maybe a little disorganized.” (*Id.* at 2; Tr. at 28). Complainant asserted that, on March 22, 2013, in contrast to what Hamilton described, Complainant had discovered a cart left in a very messy condition as a result of an avocado demonstration that Montague had performed on March 17. Complainant stated that there was dried guacamole left on the cart and on the refrigerator and unwashed bowls in a trashcan left by Montague as well as unwashed utensils. (Tr. at 27—28, 52). She testified that she texted Hamilton who replied that she had been in the store the prior day and while she noticed the cart was a bit disorganized, she had not observed the conditions Complainant described. (Tr. at 28). Hamilton’s e-mail response to Horton that night, which was copied to Mr. Bernert, was that she should have left the cart the way it was so that she could have come and taken pictures of it. (CX 30 at 2).

Horton also reported in this e-mail that she had talked to other store managers and employees who complained to her about Russell’s work habits. (*Id.* at 3). She stated that Store Manager Ryan Edwards stated that he would not let Montague back in the store. (*Id.* at 2—3).

Complainant’s April 2 e-mail also described her March 27 visit to Lawrence Walmart #484 and “the mess that Russell has been leaving in the carts over there.” (*Id.*)

Complainant also reported in her April 2 e-mail that co-worker Christina Rogers had complained to her about Montague leaving a large steak knife out in a dangerous condition. (CX 30 at 3). She stated: “Russell is a person that has problems which should be obvious to anyone that takes the time to pay attention to what is going on. He is dangerous and has now shown with malice and forethought he will do whatever to actually hurt his other co-workers. So by this part of this email I am officially notifying this company that by allowing this individual to continue to work you are putting all of the other company employees, who may come into contact with him, in harm’s way.” (*Id.*)

Complainant also noted that both new hires preferred not to work on Sundays in order to go to church. In addition, Complainant noted that Montague had previously told Hamilton that he didn't have a ride to the store on Sundays. Complainant asked for clarification from Hamilton stating that she would like to also not be scheduled for work on Sundays. (*Id.*) She also testified that the practice or unwritten rule at CROSSMARK was for the leads to get assigned the first three demos in any given store. (Tr. at 119).

Complainant indicated in the April 2 e-mail that this experience with Montague was not the first time that she had been harassed by another employee and been shut out of a store as it had also happened three years earlier. She expressed that, given her seniority, she deserved to get the most work. (EX 30 at 3—5).

Complainant received an "Autoreply" from Employee Relations as well as a confirmation from a Human Resources administrative assistant. In addition, almost within the hour, she received a response from Hamilton. (CX 30; RX 3). Hamilton responded paragraph by paragraph to Horton's April 2 e-mail, correcting or rebutting Complainant's assertions. Hamilton confirmed that Horton had complained to her about having to remind Russell Montague to wear his gloves; distinguished between her instructions on the clean water tank and dirty water tanks; and noted that Hamilton did not notice a foul smell in Store #5219 or "the issues" Complainant "described in the text". (*Id.* at 6). Hamilton rebuked Horton for discussing CROSSMARK issues with Wal-Mart employees without first discussing them with her, noted that Horton could have taken a photo of the carts to confirm the conditions she was concerned about, criticized Complainant for relating "hearsay" information about other employees, and expressed her opinion and feelings that Complainant was criticizing other employees and Jim Bernert of misconduct, and had failed to give her the opportunity to act as her supervisor. (RX 3). Hamilton explained that there were 5 employees sharing the workload at the two Lawrence stores and Horton was free to make changes to her availability. Without additional clarification, she also noted that she had received information from other parties as well as Horton. (*Id.* at 9).

Complainant sent a follow-up e-mail on April 3 to Hamilton and Employee Relations, cc'd to Mr. Bernert, in which she responded to Hamilton and in which she strongly disagreed with Hamilton's representations. (CX 3 at page 2). Complainant testified that she believed that the subsequent allegedly adverse actions management took towards her were triggered by her April 2 and 3 e-mails. (Complainant's Post-Hearing Brief at 2).

On April 19, Hamilton e-mailed Complainant to arrange for a May 1 "face-to-face" meeting to "discuss concerns." (CX 31). On May 1, a conference call occurred including Horton, Hamilton and Bernert. Complainant testified that she first heard back from management on the substance of her own complaint in that conference call. Horton was told that she could no longer work in Store #484 if Montague or another employee were there putting on a food demonstration. (Tr. at 33). She was also told to stay away from Montague. Finally, she was informed that she would receive a formal counseling form to document the discussion which she could rebut or comment on. (CX 31). Horton followed up this e-mail with a number of phone calls to Laura Rice at employee relations. (CX 32).

Complainant received a written form documenting the May 1 counseling on May 6. (CX 33). The form was designated as a “Written Warning” for performance. It referred to Complainant’s April 2 e-mail to Employee Relations, management’s concerns about Complainant’s performance, including communication issues, and attention to cleanliness and sanitation issues. It also stated that “Further Violations will result in further disciplinary action up to and including termination of employment.” (Id.) Complainant’s testimony and e-mail traffic reflected that there were times when she was unable to reach her supervisor by telephone, the internal e-mail CROSSMARK system was down, or Hamilton failed to respond to her e-mails or answer her phone. (Tr. at 71, 115; CX 35). The counseling directed that she would:

“not work with Russell Montague and will only work at Store #484 when you avoid contact with other associates who work at this location. I will not request your assistance with training any new hires or other Event Specialist. You must adhere to sanitation standards by using the Handwashing Station when it is available for use. The “dirty” water tank should be cleaned daily to avoid any issues. You should also report any potential hazards such as contamination that could threaten the Events program in Wal-Mart. If you notice issues at any locations such as rodents and/or insects, they should be reported in a timely manner as well.”

(CX 33; RX 6—7).

Complainant testified that she next worked on May 12, 2013, Mother’s Day, at Store #484. (Tr. at 33). Although he was not scheduled to be at work, Montague came into the store. (Tr. at 34). Complainant reported that Montague wanted information from her as to what had happened to Christina Rogers, who had been the lead previously, but had resigned. (Tr. 48—49; CX 34). Complainant stated that Montague did not threaten her, but commiserated with her for having to work on Mother’s Day. She testified that she tried to avoid him, consistent with the instructions that she had been given by management. (Tr. at 49). She called Hamilton and e-mailed Employee Relations, with copies to Hamilton and Bernert, to report to them about Montague approaching her. (Tr. at 35). Horton also reported that “Bruce”, the meat manager, had complained about Montague to her, and she reported that he was happy to talk to CROSSMARK management about safe food handling issues. (Tr. at 35—36; CX 34). Complainant expressed concern to Hamilton about items that she stated had not been cleaned properly by Montague and about which Bruce had complained. (Id.) She claimed that “store personnel actually referred to Montague as “The Stalker””. (Id.) Horton also complained that she was unable to work her entire six hours, but had to leave the store because of Montague’s presence and Hamilton’s instructions. Including the time for her phone call and e-mail to Hamilton, she had only worked a total of 270 minutes on that day. (Id.) Finally, by both telephone call on that day and by e-mail on May 14, Complainant informed Hamilton that, given the harassment charges against her and because Montague had been harassing her on May 12, she could no longer work at Store #484. (CX 35; Tr. at 50).

There continued to be some confusion during the latter part of May as to when Horton was scheduled to work; she was in the habit of texting Hamilton her scheduling availability and

reports despite the fact that Hamilton expressed a clear preference for Horton to telephonically communicate with her. (RX 35).

The relationship between Complainant and Hamilton continued to deteriorate during the latter part of May and June 2013. (CX 35—40). Complainant continued to send e-mails to Hamilton referring to her own complaints and those of co-workers and store management, about Montague's lack of sanitary food habits, including the allegation that the local health department had cited Store #484 for the condition of its meat department. (CX 37). Complainant wrote to Hamilton that she was ready to call the health department herself. Complainant continued to try to get specific information as to harassment allegations regarding her and to assert that Montague was, in fact, harassing her. (*Id.*)

According to Complainant, on June 9, Hamilton told her that she could now work at store #484 if she wanted to. (Tr. 36; CX 37). However, Complainant declined to work there at that time because of the ongoing dirty conditions. (Tr. at 36—37). Complainant testified that while the variety of demonstrations and hours varied with the time of year, not working at this one store, which was the larger one in the territory, greatly affected her work and income. (Tr. at 39). She also testified that she was upset about the written counseling memo she received, which she believed falsely reflected that she did not have a good relationship with Walmart management. (Tr. 38—40). Complainant testified that she had a good relationship with the store management for over a two year period; and she stated that it was because of the strength of her relationship with Walmart management that the store managers complained to her about Montague's behavior at the store. (Tr. 40—45).

Then, on June 15, with copies to Mr. Bernert and Human Relations, Complainant reprised her allegations to Hamilton, reiterated that Hamilton had created a hostile work environment for her, recited her good ongoing relationships with Walmart management, denied ever harassing a fellow employee, commented on the lack of concern of CROSSMARK with unsanitary conditions in their carts and equipment and repeated her reporting of unsafe and unsanitary food conditions to her supervisors. She alleged in that e-mail that she believed that the counseling memo and management issues with her performance arose in retaliation for her disclosures about unsafe and unsanitary work practices by Russell Montague and other employees, and specifically her April 2 note. (CX 38).

On June 20, 2013 Complainant resigned her position with CROSSMARK. (CX 40; Tr. at 56).

Respondent

Camille Hamilton, Complainant's supervisor during the relevant period, testified on behalf of Respondent. At the time of her testimony, Hamilton occupied the position of district supervisor for the area covering Kansas City, Joplin, and Springfield, Missouri, a position to which she had been promoted in May. In addition to those new duties, she remained at her former position and Complainant's supervisor for the Walmart team covering a total of 24 stores up until May 20, 2013. She continued to maintain the schedules and other duties in the area until a replacement could be found. (CX 40; Tr. at 63—64). In her new position, she supervised a

total of 50-65 Event and Lead Event Specialists operating out of her home in Basehor, Kansas. Her territory extended a total of 5 ½ hours' drive from north to south. (Tr. 64—65). She only met the Complainant once, on March 2, 2013. (Tr. at 66).

Hamilton described the duties of an LES as conducting food demonstrations in Walmart stores, serving food samples to customers, reading and following the instructions for their demonstrations, purchasing the items they needed for an event, and greeting, talking, and selling their merchandise to Walmart customers. (Tr. at 65). They are expected to build positive relationships with Walmart management employees in their stores. They are also trained in food safety practices. Lead event specialists must receive a national certification; either a lead event specialist or a supervisor trains the event specialists. (Tr. at 66). Event specialists do not have a set schedule of work hours. (Tr. at 112). The goal for the area supervisor was to assign enough work to event specialists to permit them to work 12 to 18 hours per week, with the hours evenly distributed among a team of employees. (Tr. at 83, 108). Each event took about six hours or 360 minutes and the schedule varied by season depending upon the number of actual events determined by Walmart or the individual product vendor. (Tr. at 109—112).

The first time Hamilton met Complainant was at the March 2 demonstration for Cup of Noodles where she was training Russell Montague. She picked up a couple of boxes of the product and began setting them on the cart. She noted in her testimony that Horton then moved the boxes, which took her aback and, in response to her reference to their prior day's conversation that Horton could not locate the product, she said: "Oh, here's the product." Horton responded: "Oh, they just received it in. I already know that we had it. I've already cooked some, I already know what I'm doing." (Tr. at 67—68). Hamilton testified that she responded "I'm not even going to discuss it right now because" they were on the sales floor with shoppers. (Tr. at 68).

After the initial introductions between them and the new event specialists, the two went to review the set-up in the store. Hamilton testified that she did not notice that Montague did not have a beard guard, but also stated that Hamilton did not bring up any kind of health concerns about Montague at that time. (*Id.*)⁶ The two did talk about the lack of a permanent washing station at the store. Then, after taking her picture and observing Horton serving samples for about an hour, Hamilton left. (*Id.* at 69). Mrs. Hamilton testified that she informed her subordinates of her normal practice of conducting communications with her – a weekly e-mail from her, a rough draft of schedules and, instructions that if there was any problem or need to report, the specialists should call her rather than texting or emailing. (Tr. at 70).

Hamilton testified that she first learned of Complainant's concerns about Russell Montague's performance and food safety issues by e-mail the next day. (Tr. at 70). She testified that, in response, Hamilton informed Complainant that she would "get with Russell." She testified that she did speak with him on the phone, by e-mail, and in-person at Store #484 on March 22. (Tr. at 71, 73). She also acknowledged that assistant manager Mike Scott expressed some concern to her about Montague. (Tr. at 88). Hamilton acknowledged receiving text messages from Horton about the guacamole conditions on Montague's cart on March 2 and admitted that she herself had not noticed it. (Tr. at 89). Hamilton noted that although she texted

⁶ Horton testified that it was also her first time meeting Russell Montague.

Complainant a few times about the matter and called her, she did not hear back from Complainant until receiving a “long laundry list” of complaints that Horton sent employee relations on April 2. (*Id.* at 71; RX 3). Hamilton testified that she was concerned that Horton had not raised any of the issues (except the hand-washing station) with her previously. Food safety was important and Complainant was inappropriately sharing “CROSSMARK business” with the client, Walmart. (Tr. at 73).

Hamilton responded to Horton’s April 2 e-mail on the same day that she received it, paragraph by paragraph, copying her response to Jim Bernert. (RX 3). In that e-mail she communicated that she had attempted to reach Horton a number of times by both telephone and text on March 23, but had not heard back from Horton as to her concerns about Montague until the April 2 e-mail. (*Id.*) She stated that March 2 was the first time that she had met Horton and Montague. Hamilton stated in the same e-mail that she had received on March 3 an e-mail from Horton titled: “Carts in Backroom and Russell” and that “these matters have been addressed with Russell Montague.” (*Id.*) She responded to Horton’s concerns dated March 9 by distinguishing between the hand washing station and the clean and dirty water tanks, the latter requiring washing after each event. She noted that she had not noticed Montague’s March 22 event being a problem, it was not mentioned to her by Walmart Managers, and Horton needed to communicate with Hamilton in the manner Hamilton had requested. She stated: “since you are not the supervisor and are unaware of the proper way to handle HR complaints that deal with a specific employee (i.e. Russell Montague), you would not understand why I would need a photo to confirm that the cart was left in the manner you have described.” (*Id.* at 7; Tr. at 90—91). Hamilton indicated that she had never experienced any of the health issues Horton raised with the Topeka store. She also emphasized that she had left her contact information with the store manager and assistant manager and that Horton should first bring any potential hazards with the program to her. (Tr. 88, 91).

Hamilton indicated that all the information Horton had shared about other employees either has been or will be reviewed and stated: “You are accusing not only myself, but previous RSEs (Stephanie and Marvin) and even my supervisor, Jim Bernert of misconduct.” In response to Horton’s reports of complaints from other employees, Hamilton warned her against the use of “hearsay”. Finally, Hamilton addressed scheduling issues and the fact that Lawrence was fully staffed. She expressed concern that all new hires, including Montague, deserved an opportunity to grow. Hamilton expressed appreciation for Horton’s three years of service, but expressed concern that from the first day Horton had trained Montague, there had been issues about Horton’s supervision of the new trainees. In closing, Hamilton stated that from then on, Hamilton would conduct training for new hires in the Lawrence area and would convene a conference call with all of the area’s event specialists, to include Bernert. Hamilton referred to having received information from other persons about these matters and closed by stating that Horton had not “even attempted to give [me] an opportunity as [your] supervisor.”

Hamilton testified that she also separately contacted Supervisor Bernert on or around March 23 to try to get some background on Ms. Horton as “she was very disgruntled in general.” (Tr. at 75—76). In reviewing Horton’s April 2 e-mail with Employee Relations and Jim Bernert, she mentioned Horton’s disclosure to her that a previous supervisor had removed Horton from Store #484 and reiterated her concerns about Horton’s “disposition and attitude” towards her as

well as “a level of insubordination” and “comments as if she is aware of how to perform” Ms. Hamilton’s supervisory responsibilities. (RX 3).

Hamilton testified that she first heard complaints from Montague regarding Horton on March 17, about a week after hearing from Complainant. (Tr. at 101). She also received a call from Montague in which he expressed concerns that “different things” were “being talked behind his back” and that Mrs. Horton talked negatively about the company and store management at Store #484. (Tr. at 74). Ms. Hamilton testified that she had asked Montague to put his concerns in writing so they could be provided to employee relations. He did; and she forwarded his e-mail to Employee Relations. (Tr. 74—75; RX 4). His concerns included the creation of a “hostile work environment” by Horton for himself, Jasmine Matchette, and Christina Rogers and a predisposition by Horton towards conflict and gossip. He asked for an investigation. (*Id.*) Subsequently, on April 13, Montague filed a formal complaint against Horton with Hamilton, which Hamilton forwarded to Employee Relations and her supervisor, Jim Bernert. (RX 5).

Hamilton testified that her biggest concerns with regard to Complainant were “her communications of food safety concerns” not occurring in a timely manner through telephone rather than through e-mail. (Tr. at 76). Accordingly, she planned a counseling session for May, which she documented as a “Written Warning”. (Tr. at 76, 77; RX 6-7). As a result of that session, she and Jim Bernert determined that Complainant would only be permitted to work at Store #484 if Russell Montague was not scheduled for work at the time. (*Id.*) She explained that unlike Complainant, who was available to travel to other locations, Montague was limited because of public transit to working at Store #484. (Tr. at 105).

Hamilton testified that on May 12, Horton called her “very frantic” that Montague was in the store although he was scheduled for the day off. (Tr. at 78). Hamilton instructed Horton to shut down the station and leave the store, which Horton did. *Id.* Horton informed Hamilton that given that she still did not have a clear understanding of the harassment charges against her involving Montague, she could no longer work at Store #484. (CX 35; Tr. 79).

Horton sent Hamilton an e-mail about two and a half hours later recounting the interaction between Montague and herself noting that Montague had approached her cart three times. (RX 7; CX 34). In addition, Horton expressed other concerns in her e-mail – concerns that Hamilton documented that Horton had not related in their telephone conversation. (RX 7). These concerns included discussion of the counseling form, an unclean cart and sneeze guard, and complaints that two meat department employees had related to Horton regarding Montague’s unsanitary work habits the day before. (RX 7).

Hamilton followed up by asking Montague for his “take” on the encounter and asked him to write a statement. (Tr. at 78—79). He did so confirming that he came by Horton’s cart three times, they had casual conversation, and Horton had folded down the cart the last time he saw her. (*Id.*; RX 8). His note also indicated that he was “sorry to hear that there are still problems with Elaine” and that he had not yet been contacted by HR. (*Id.*)

Later in May, Hamilton remained concerned about Horton’s failing to communicate with her in a timely fashion, including her shift coverage. (Tr. at 80; RX 9). Horton continued to

make clear that she did not want to work at Store #484, although there was some vacillation on her part between June 3 and June 9. Tr. at 81; 94—95; RX 37. In the meantime, both Carol Caro and Christina Rogers had apparently quit CROSSMARK. (CX 42, CX 35).

On June 17, Hamilton informed Complainant that she would no longer be discussing employment issues with her and referred her to Employee Relations. (CX 40). She also stated that having documented all her conversations with Horton, she was filing a complaint against her with CROSSMARK for harassment, failing to maintain a cooperative relationship, and insubordination or gross mismanagement. (CX 39).

On June 20, Complainant informed Employee Relations of her resignation effective immediately. (CX 40).

Applicable Law

The 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 (“FDCA”), [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 new whistleblower protection provision that contained procedural and remedial protections for whistleblowers in the food industry. The relevant provisions of the FSMA provide that

“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.

Pub. L. No. 111-353, § 402, 124 Stat. 3885 (codified at 21 U.S.C. § 399d(a)).

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—52.⁷

The DoL regulation sets forth the requirements for the content of the decision and order of the ALJ, 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).

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

⁷ 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 (02/13/2014), 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 the Office of Administrative Law Judges and appeals from decisions by ALJs 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.

decision.” *Powers v. Union Pacific Railroad 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)).

Discussion and Analysis

Crossmark Is An “Employer” And Complainant Is An “Employee”

The parties did not specifically address whether CROSSMARK, the putative employer in this matter, and the Complainant, an employee of CROSSMARK at the relevant times, are covered by the FSMA.⁸ Nonetheless, I am obliged, before ruling on the merits of the case, to determine whether the court may exercise subject matter jurisdiction, and specifically determine whether Respondent CROSSMARK is an “entity” covered by the Act, i.e., is *engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food*. (Italics added.)

21 U.S.C. § 399d does not define any of its specific statutory provisions. In fact, a definition of the word “entity,” as it appears in the whistleblower protection provisions, is not found anywhere in the Act.^{9,10} Considering the plain meaning of the text is the initial step in interpreting a statute. “Entity” is defined as “n. a general term for any institution, company, corporation, partnership, government agency, university or any other organization which is

⁸ The Complainant was clearly an employee of CROSSMARK at the time of the alleged retaliation as demonstrated by the facts in evidence, including W-2 forms. *See also* RX 1 (Employment Acknowledgement); RX 2 (payment Detail Listing with Social Security and other employee deductions).

⁹ The FSMA was incorporated into the FDCA and became codified as part of Chapter 9 of Title 21 of the U.S. Code, entitled FEDERAL FOOD, DRUG and COSMETIC ACT. Title IV of FSMA contains, MISCELLANEOUS PROVISIONS, including Section 402. EMPLOYEE PROTECTIONS. Section 402 was, in turn, codified as 21 U.S.C. § 399d or Section 1012 of Chapter X of the FEDERAL FOOD, DRUG and COSMETIC ACT. In turn, when codified, that Employee Protection provision substitutes the word “Chapter” as opposed to “the Act”.

¹⁰ Other terms in the FSMA, which include the word “entity” with other descriptive language, do appear in other sections of the Act not involving Employee Protections. Thus, the term “eligible *entity*” (italics added) is defined and used in the Act in referring to those state, locality, or other governmental or nonprofit organizations involved in examining, inspecting, or investigating food practices as part of the food safety infrastructure and which are thus eligible for the receipt of federal grant moneys. *See* Pub. L. No. 111-353, § 210 (amending Section 1009 of the FDCA). The term “Small *Entity* Compliance Policy Guide” (italics added) appears in reference to agency proposed rulemaking under the Act. *See* Pub. L. No. 111-353, §§ 102(b)(2), 105(a). The word “*entity*” also appears by itself in reference to MODIFIED REQUIREMENTS FOR QUALIFIED FACILITIES, involving subsidiaries or affiliates of an entity, and, in STANDARDS FOR PRODUCE SAFETY, referring to imposition of a one year time period for enacting guidance for agricultural and production and harvesting after consultation with “entities” engaged in such activities. *See* Pub. L. No. 111-353, §§ 103, 105.

distinguished from individuals.”¹¹ The term is thus a broad one which includes all kinds of for-profit and not-for-profit organizations and state or local entities.

According to Respondent, CROSSMARK is a business which “provides sales, merchandising, and other retail services within retail stores across the United States.” (Respondent CROSSMARK’s Post-Hearing Brief (“RPHB”) at 2). Its retail services include “merchandising, proprietary data collection services and in-store demonstration and sampling events.” *Id.* CROSSMARK’s mission is to “increase product sales through marketing and product demonstrations.” *Id.* As demonstrated by the record, Complainant and her colleagues are hired and employed by CROSSMARK for the express purpose of processing and preparing foods for product demonstration to Walmart customers. I find CROSSMARK is covered under a broad definition of the term “entity.”

However, the relevant employee protection provision of the FSMA further circumscribes the definition of a covered “entity”; it must be “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 21 U.S.C. § 399d(a). That language is consistent with, and similar to, various descriptive and defining substantive provisions of the Act.¹² Thus, the FDCA’s definition of the term “food” is “(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.” *See* 21 U.S.C. § 321(f). Neither the FSMA nor the FDCA define the terms “manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.”

As this is a question of statutory interpretation, the Supreme Court’s guidance in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) is instructive. In *Lawson*, the Court considered whether employees of private companies contracted to manage and advise mutual funds were covered by the Sarbanes-Oxley Act’s whistleblower protection provisions. The Court’s opinion outlined the basic considerations in undertaking interpretation of a statute. After first looking to the actual text of the statute,¹³ a court may look to sources beyond the text, such as legislative history, to inform its analysis. *Id.* at 1165, 1169. Additionally, a court may look to the broader context within which the statute was enacted. *Id.* at 1171—1175. Indeed, the Supreme Court has said that the relevant section must be read within the context of the entire statute:

¹¹ In establishing a regulatory framework for the handling of food safety (as opposed to the employee protective provisions covering “entities”), Congress specifically imposed certain specified obligations on “facilities” handling food, beginning with the requirement of registration. *See* Pub. L. No. 111-353 § 102(a) ; 21 USC § 350d((a). It also specifically exempted certain kinds of “facilities” from registering with the FDA, such as retail food establishments, like restaurants, roadside stands or farmer’ markets, or certain facilities with more monetary value in sales to end-users, i.e. the general public, than to other purchasers, such as other businesses. *See* Pub. L. No. 111-353 §102(c). In contrast, 21 U.S.C. § 399d does not use the work “facilities,” and does not adopt the specific exemptions applicable to the registration requirement in the Act. Rather, it uses the term “entity” as a common use term without reference to any of the food safety regulatory authorities of the FDA or other food regulating authorities.

¹² *See* Pub. L. No. 111-353 § 101(a)(1) “USE OF OR EXPOSURE TO FOOD OF CONCERN”; *see also* §103, “HAZARD ANALYSIS AND RISK-BASED PREVENTIVE CONTROLS. “(a) IN GENERAL.”, “(c) PREVENTIVE CONTROLS.”, and “(o) DEFINITIONS. “(1) CRITICAL CONTROL POINT...”

¹³ “In interpreting a statute, our inquiry must cease if the statutory language is unambiguous.” *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) (citation and internal quotation marks omitted).

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme,” and “fit, if possible, all parts into a harmonious whole.”

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132—33 (2000) (internal citations omitted).

Legislative reports are evidence of Congressional intent. But there are none here, as there are no reports on the precise bill that became law.¹⁴ Floor statements of individual legislators “should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress’ intent.” *Brock v. Pierce Cnty.*, 476 U.S. 253, 263—65 (1986) (discussing House and Senate reports as evidence of legislative intent and qualifying, as quoted above, statements of individual legislators as evidence of such intent). In this instance, the Congressional Record contains floor statements showing individual members’ intent concerning the FSMA. Many members shared stories of constituents who were sickened or killed by unsafe food. Outbreaks of foodborne illnesses from contaminated peanut butter and spinach appear to have provided the impetus for the bill’s introduction.¹⁵ The Act itself, as well as floor statements, focus on the importance of preventive controls. When introducing the bill in the Senate, Sen. Richard Durbin explained that the bill “requires the food industry to have in place plans that address identified hazards with the right preventative measures.” 155 Cong. Rec. S2692-3 (March 3, 2009). In later debate, he noted that, “[e]xperts agree that individual businesses are in the best position to identify and prevent food safety hazards. That is why the bill asks each business to identify the food safety hazards at each of its locations and then implement a plan that addresses these hazards.” 155 Cong. Rec. S11396 (Nov. 17, 2009).

Other legislators also focused on the preventive measures in the bill. “Companies that process or package foods will be required to implement preventative systems to stop outbreaks before they occur ... it will fundamentally shift our food safety oversight system to one that is preventative in nature as opposed to reactive,” said Representative Henry Waxman. 156 Cong. Rec. H8885 (Dec. 21, 2010). Representative Danny Davis highlighted that the bill specifically “requires food producers to come up with strategies to prevent contamination and then continually test to make sure these strategies are working.” 156 Cong. Rec. E2249 (Dec. 22, 2010).

¹⁴ The bill that became law was S. 510/H.R. 2751, 111th Cong. The committee report on H.R. 2749, the Food Safety Enhancement Act of 2009, was passed by the House on July 30, 2009, but was not passed by the Senate. H. Rep. No. 111-234 (2009). H.R. 2749’s whistleblower provision would have applied to any “person who submits or is required under this Act to submit any information related to a food, or any officer, employee, contractor, subcontractor, or agent of such person...” *Id.* at § 212 (emphasis added; *see* H. Rep. No. 111-234 at 33, 57).

¹⁵ *See* Proceedings and Debates of the 111th Congress, 156 Cong. Rec. H8861-91 (Dec. 21, 2010).

Another source of guidance may be found in the implementing agency’s regulations. DoL regulations define “covered entity” as an “entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 29 C.F.R. § 1987.101(d). However, neither the Department of Labor’s regulations nor the preamble to its Interim Final Rule provide any guidance as to the meaning of the terms “manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” See 29 C.F.R. § 1987.101; Procedures for Handling Retaliation Complaints under Section 402 of the FDA Food Safety Modernization Act, 79 Fed. Reg. 8619, 8621 (Feb. 13, 2014). Accordingly, I must look to the ordinary meaning of those words within the context of the relevant statutory and regulatory framework.

The regulatory definition of the term “manufacturing” as previously adopted by the FDA is:

Manufacturing/processing means making food from one or more ingredients, or synthesizing, preparing, treating, modifying or manipulating food, including food crops or 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.

21 C.F.R. § 1.227(b)(6). “Manufacture” is defined by Merriam-Webster as “something made from raw materials by hand or by machinery,” “the process of making wares by hand or by machinery especially when carried on systematically with division of labor,” “a productive industry using mechanical power and machinery,” and “the act or process of producing something.”¹⁶ The dictionary definition of “process” includes, “a series of actions or operations conducing to an end; *especially*: a continuous operation or treatment especially in manufacture.”¹⁷ “Importation” is defined as “the act or practice of importing” and in turn the relevant definition of “import” is “to bring from a foreign or external source: as ... to bring (as merchandise) into a place or country from another country.”¹⁸ The dictionary definition of the term “holding” includes “to have possession or ownership of or have at one’s disposal.”¹⁹ The FDA’s regulatory definition for “holding” is: “Holding means storage of food. Holding facilities include warehouses, cold storage facilities, storage silos, grain elevators, and liquid storage tanks.” 21 C.F.R. § 1.227(b)(5).

“Preventive controls” are defined in the FSMA. They are “risk-based reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ” 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).

¹⁶ MERRIAM-WEBSTER DICTIONARY; www.merriam-webster.com/dictionary/manufacture

¹⁷ MERRIAM-WEBSTER DICTIONARY; www.merriam-webster.com/dictionary/process

¹⁸ MERRIAM-WEBSTER DICTIONARY; www.merriam-webster.com/dictionary/import

¹⁹ MERRIAM-WEBSTER DICTIONARY; www.merriam-webster.com/dictionary/hold

The Act includes a nonexclusive list of examples of preventive controls: “(A) Sanitation procedures for food contact surfaces and utensils and food-contact surfaces of equipment, (B) Supervisor, manager, and employee hygiene training; (C) An environmental monitoring program . . . (F) Current Good Manufacturing Practices (cGMPs) under part 10 of title 21, Code of Federal Regulations (or any successor regulations)...”, 21 U.S.C. § 350g(o)(3). These controls are “reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ” 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)(A)—(G).

Similarly, the FDA’s regulations at 21 C.F.R. Part 110, entitled Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food, suggest application of sanitary measures in all food operations.

All operations in the ... *preparing, manufacturing, packaging, and storing* of food shall be conducted in accordance with adequate sanitation principles. Appropriate quality control operations shall be employed to ensure that food is suitable for human consumption and that food-packaging materials are safe and suitable. All reasonable precautions shall be taken to ensure that production procedures do not contribute contamination from any source. *Chemical, microbial, or extraneous-material testing procedures shall be used where necessary to identify sanitation failures or possible food contamination.*

21 C.F.R. § 110.80. (Emphasis added).

In analyzing the Act, its purpose, its limited legislative history, and its expressed concern for preventive measures to be taken by different individuals at each step of the food handling process, I find that CROSSMARK is an entity engaged specifically in the processing, packing, distribution, reception, and holding of food, and is within the jurisdiction of Section 399d. Respondent’s Event Specialists, like Complainant and her colleagues, clearly perform food preparation functions that can impact public health. I determine that, based on the statute, the legislative history, the public health partnership in food safety long existing among the federal, state, and local governments, its extension through private and nonprofit establishments, the strengthening of such relationships, which was clearly intended in FSMA, and, finally, the discussion above that CROSSMARK is “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food,” it is an entity within the meaning of 21 U.S.C. § 399d(a).

Findings of Fact and Conclusions of Law

Complainant, Elaine Horton, began employment with CROSSMARK in April 2010 and continued thereafter until her voluntary resignation on June 20, 2013. (Tr. at 56; 53). Her duties were: training Event Specialists in preparing for foodstuffs, setting up foodcarts, serving

customers, and cleaning up before and after food events during which a variety of food suppliers offered food samplings and demonstrations to Walmart customers in Walmart stores. Horton was a Certified Professional Food Manager. Horton had regularly complained to her employer and supervisors about food safety issues before March 2013. (*Id.*; CX 40). She had also complained regularly about the performance of other Lead Event Specialists and several supervisors.

In March 2013, Complainant began serving under a new supervisor, Camille Hamilton. At around the same time, a new employee, Russell Montague, started employment as an event specialist at the Walmart store to which Horton was chiefly assigned. Horton was responsible for Montague's training.

It is clear from the record that Horton and Hamilton got off on the wrong foot from the very beginning. (*Compare* Tr. 20-25 with 66—71 and 87; RX 3 at 4—9; CX 40). Except for an exchange of e-mails (RX 24—26) and a call from Horton to Hamilton the day before letting her know that there was some problem finding the food that was to be demonstrated (Tr. at 66), the two first met when Hamilton showed up at Walmart Store on March 2, 2013 where Horton was conducting a training for two newly hired event specialists. (Tr. at 20—25).

From their descriptions, Horton and Hamilton both felt disrespected as a result of this encounter. Their opinions of each other worsened as Horton expressed clear dissatisfaction with the work performance of one of the new employees, Russell Montague, involving his personal hygiene habits while handling the food and clean-up issues. In turn, Hamilton became dissatisfied with Horton's failure to communicate her concerns directly and immediately to Hamilton as they were happening. Instead, Horton would wait until after her shift was over. Horton and Hamilton also disagreed over the former's discussion of work issues with Walmart management. Horton believed she had developed a working relationship with various store and department managers. As the person on site, those Walmart employees tended to raise any concerns over CROSSMARK practices with her. However, Hamilton clearly expected Horton to refrain from such discussions and refer the Walmart managers to Hamilton.

Unfortunately, as reflected in both women's testimony and exchange of e-mails introduced into evidence, disagreements and tensions between the two became exacerbated. Matters escalated with the sending of Horton's April 2 complaint to Employee Relations with copies to Mr. Bernert, Hamilton's supervisor and to Hamilton herself. (RX 30). Hamilton also received complaints about Horton from Montague. Horton relayed complaints from store management with regard to food handling issues and sanitary issues surrounding CROSSMARK demonstrations. Hamilton repeatedly expressed to Horton that such complaints should come to her rather than to Complainant and that they be immediately reported.

In May, matters came to a head. Hamilton and Jim Bernert, Hamilton's supervisor, counseled Horton telephonically and then sent her a written counseling form which both referenced sanitation issues and Hamilton's April 2 e-mail. The counseling form contained specific language that "Further violations will result in further disciplinary action up to and including termination of employment." (CX 33).

Horton was informed that she could no longer work at Store # 484 if Montague was scheduled, and she then made several attempts to get Employee Relations' assistance with regard to her complaints. (CX 32). When Montague appeared at the store as a customer on Mother's Day of that year and approached her three times while Horton was working, Horton became unnerved. (CX 34). She called Hamilton and cut her shift short. During the same conversation, Horton reported that the meat manager had complained to her about Montague's work habits on the previous day. Hamilton, in turn, informed Horton that she would only be paid for the actual time she had spent in the store. Horton informed Hamilton that she no longer wanted to work at the store and asked to be removed from events for which she was scheduled on May 16 and 23. Once again, Hamilton informed Horton that she was still not communicating in a timely manner and that Hamilton would seek further advice from Employee Relations. Both women expressed to each other and other CROSSMARK managers that each felt harassed by the other. (CX 34-38). On June 17, Hamilton informed Horton that she (Hamilton) had been promoted within CROSSMARK and would only be maintaining scheduling and other duties until a replacement was hired. (CX 39). She also informed Horton by e-mail dated June 17, 2013 that she was requesting an investigation by CROSSMARK's Employee Relations of Horton based on various harassment allegations of Horton's mistreatment of her as a co-worker and supervisor. Hamilton requested that Horton stop communicating with her.

Three days later on June 20, 2013, and after what Horton described as ongoing poor treatment and harassment by various CROSSMARK employees, specifically Montague and Hamilton, Complainant resigned her position, effective immediately.

In deciding the merits of this case, I address the following questions *seriatim*:

- (1) Whether Complainant engaged in protected activity when she informed CROSSMARK that her co-worker failed to wear a beard guard when serving food and failed to change the potable water used for washing?
- (2) If so, whether Complainant's protected activity was a contributing factor to a decision by Respondent resulting in a reduction-in-pay?
 - (a) Did a reduction-in-pay occur?
 - (b) Did a decision of Respondent contribute to a reduction-in-pay?
- (3) If so, whether Respondent demonstrated by clear and convincing evidence that, even absent Complainant's protected activity, Complainant would still have suffered a reduction in pay?

Whether Complainant Engaged In Protected Activity

Complainant never articulated nor identified a specific violation of the FSMA or food safety law generally.²⁰ Complainant alleged that she provided her employer and was about to provide the public health service with information regarding the unsanitary practices utilized by CROSSMARK employees in their set up and serving of various food products at Walmart.

²⁰ Nor did she identify any order, rule, regulation, standard, or ban under this chapter, or any order, rule, regulation, standard, or ban.

Complainant repeatedly raised three specific issues which she identified as food sanitation issues: (1) the failure of her coworker Montague to wear a beard net and gloves while preparing and serving food; (2) the failure by CROSSMARK workers to regularly replace washing water; and (3) the failure to clean up and sanitize food implements after using them.

Complainant is neither a scientist, a lawyer, nor a hygienist, nor does she belong to some other profession requiring highly technical or sophisticated training or an academic background. However, Complainant was, at all relevant times, a Certified Professional Food Manager for a company that describes itself as having a mission to “increase product sales through marketing and product demonstrations.” (RPHB at 2). Common sense, a reasonable understanding of hygiene, a cursory review of the FDA website, and a review of the FSMA and its implementing regulations and policies, all make evident that Congress, in adopting the FSMA and its employee protection provisions, intended to make each person in the food distribution chain a potential source of information. The FSMA provides for a network of food safety “from the farm to the table”. It was intended to cover each and every aspect of that food chain from the farm to transportation to holding to “direct sale and distribution” and identify “every critical control point” in the food process. *See* 21 U.S.C. §350g(c)(1)(C)); 21 U.S.C. § 350g(o).

Given the statute and the various food handling crises that predated and resulted in the passage of the FSMA, I find that Congress intended to cover each point or location in the food production and delivery process to ensure the health of American families. It is also clear from the Congressional hearings and public record of food incidents that the Congress intended its legislation to promote prevention of food hazards at every stage of food manufacturing, processing, holding, and selling to the public. It is also evident from the FDA regulations and guidance that a critical point in the process is the handling of food items, including their washing. Indeed, a key preventative technique identified in the FSMA literature is the washing of hands, utensils, and cutting boards and separation of uncooked meats, poultry and seafood from vegetables, fruits, and ready-to-eat foods. *See* 21 U.S.C. § 350g(o)(3)(F); 21 U.S.C. § 350g(o)(3)(A)-(G) (“reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ” that are “consistent with the current scientific understanding of safe food manufacturing, processing, packing, or holding at the time of the analysis.”); 21 C.F.R. § 1.227(b)(6) (“Manufacturing/processing means making food from one or more ingredients, . . . Or manipulating food, including food crops or ingredients. Examples of manufacturing/processing activities are cutting, peeling, trimming, washing, . . . cooling, . . . mixing . . .”).²¹

The FSMA’s protections from such regular occurrences in the food supply apply to every entity and employee employed by such entity engaged in food handling, including Complainant

²¹ Various forms of bacteria in foods are present or can develop in foods. For example, listeria is a bacteria found in soil, water, and some animals, as well as in raw milk or foods made from raw milk. It can grow even in refrigerators. While most persons are not at risk, certain members of the population, such a pregnant women, older adults, or persons with weakened immune systems or diseases, are susceptible. Likewise, *E. coli* infections are normally ultimately harmless, but they can cause death in young children and adults with compromised immune systems.

who was responsible for handling and supervising the handling of food at a large scale retail facility – a function for which she specifically obtained specialized training.²²

Complainant raised food safety and health issues to her supervisors involving food preparation, personal sanitation issues of other employees, and washing and cleaning techniques. While Horton did not specify a specific rule, regulation, or standard in repeatedly raising her concerns over sanitary practices in the food handling of CROSSMARK demonstrations, the law does not require a complainant to identify to her employer a specific “order, rule, regulation, standard, or ban” under the FSMA to claim protection under the Act’s whistleblower provisions. From her repeated and clearly deeply held concerns over the food practices that she observed and which she reiterated during her testimony, I find her testimony with regard to her subjective belief that the practices she observed were in violation of the FSMA. Moreover, I find that a reasonable person with Complainant’s education, experience, and training in food handling techniques would also have found the food handling practices of not using a beard guard and not cleaning utensils in a thorough and timely manner after use, as well as the delay in changing water, would have believed that such acts and omissions violated basic food and safety hygienic practices. Consequently, I find Complainant engaged in protected activity under the Act.

Whether Complainant Suffered Adverse Actions

The crux of this complaint is Horton’s allegation that, as a result of her reporting unsanitary conditions involving and/or caused by a CROSSMARK employee, CROSSMARK reduced her normally scheduled hours which, in turn, resulted in a reduction of her pay. This is the complaint that Ms. Horton filed with OSHA on May 13, 2013.²³ The parties identified the chief disputed issue as whether Complainant actually suffered an adverse action, focusing on the issue of loss of pay based on a reduction in her event assignments, specifically at the two Lawrence area stores. Complainant argued that she would have earned additional hours and pay after March 2, 2013, and again after April 2, had she not complained about sanitation issues in her e-mails to her supervisor and other management officials. Respondent argues that Ms. Horton’s complaint did not contribute to the reduction of hours and that, in any case, she failed to carry her burden of proof that there was a reduction of hours or that the reduction was due to her protected activity.²⁴ Specifically, Respondent argues that there was a small drop in the number of hours scheduled amounting to a maximum amount of \$300. (Tr. at 10). Respondent also argues that Complainant’s history of

²² See <http://vsearch.nlm.nih.gov> *supra*.

²³ The original complaint to OSHA was taken over the telephone and reduced to writing.

²⁴ Respondent does not really dispute that Complainant engaged in protected activity except to argue that it could not be a “contributing factor” because Complainant had expressed such concerns previously, and it had not taken any retaliatory action. I reject Respondent’s argument. While it may be true that Complainant had previously engaged in protected activity, any such prior activity and action in response thereto, is not at issue in this case and is of little probative value. Moreover, in this matter, Complainant’s allegations were triggered by the actions of a new employee, Russell Montague, and the appearance of a new supervisor, Camille Hamilton, and Horton’s perception that Hamilton was not properly responding to her safety and health complaints resulting from Mr. Montague’s actions. (“[T]here is no hard and fast rule that any specified amount of time is too removed for an inference of causation,” and where a “defendant retaliates at the first opportunity that is presented, a plaintiff will not be foreclosed from making out a prima facie case despite a substantial gap in time.” *Byrd v. District of Columbia*, 807 F. Supp. 2d 37, 69, fn 24 (D.D.C. Aug. 16, 2011) ; *Barnabas v. Board of Trustees of District of Columbia*, 686 F. Supp. 2d 95, 105—106 (D.D.C. Mar 1, 2010) (citing *Cones v. Shalala*, 199 F.3d 512, 521 (D.C.Cir. 2000) (citing *Pardo-Kronemann v. Jackson*, 541 F. Supp. 2d 210, 218 (D.D.C.2008))).

bringing food safety issues to her employer, without any corresponding allegation of retaliation by the employer in the past as a result of her raising such concerns, demonstrates that retaliation did not occur in this instance.

In addition, although not clearly raised in her complaint as reported by OSHA, both parties raised the May counseling memorandum given to Complainant. Respondent raised it as an affirmative defense, and Complainant raised it as an additional adverse action during the hearing²⁵ and in her Post-hearing Brief. The counseling memorandum arose out of the same nucleus of events raised by Complainant and answered by Respondent. Since Complainant, who is pro se, asserts that she had timely raised the counseling memorandum during the OSHA investigative proceeding as well as during the hearing itself, I have considered it as a timely amendment.

Employer warnings about performance issues are serious employment actions. An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity. *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011); *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White*, 548 U.S. 53 (2006). Indeed, such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. They are not trivial but “material” under *Burlington Northern*. Even though a disciplinary letter does not result in a firing or demotion, it is still adverse. *See, e.g., Self v. Carolina Freight Carriers Corp.*, 1989-STA-9, slip op. at 15 (Sec’y Jan. 12, 1990) (warning letters that “served to progress [the c]omplainant toward suspension and discharge” adversely affected him even though the letters did not result in suspension or discharge). *Helmstetter v. Pacific Gas & Electric Co.*, 1986-SWD-2 (Sec’y Sept. 9, 1992).

If the Complainant had waited to raise the counseling as a separate adverse action until her Post-hearing Brief, that would be too late even for a *pro se* litigant. *See, e.g., Willis v. Vie Financial Group, Inc.*, No. Civ. A. 04-435, 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004) (barring a complainant's claim because he did not amend his OSHA complaint to assert post-complaint retaliation); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, slip op. at *9 (ARB Sept. 29, 2006) (the ARB generally will not consider arguments or evidence first raised on appeal); *Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004, slip op. at *9 (ARB Feb. 28, 2006) (the ARB was unwilling to entertain an argument from the complainant that he had engaged in certain activity where he had not presented that theory to the ALJ, and where the argument was supported by no “references to the record, legal authority or analysis.”). However, crediting the Complainant’s statements and in light of the Respondent’s raising of the counseling memorandum, I consider it as an adverse action properly placed before me.

²⁵ “That written counseling form was also part of my – you know, when Kevin from OSHA did my complaint, it was not just solely based on my income. It was the insult of that written counseling form....” (Tr. at 39—40).

Whether Complainant Carried Her Initial Burden of Proof That Respondent Discriminated Against Her By Reducing Her Hours of Work and Thus Her Pay

If I were to base my findings on the testimony alone, I would find this to be a closer case. It was clear from the testimony that the chief protagonists to this dispute, Complainant and her supervisor, had a difficult and contentious, albeit brief, relationship and “pushed each other’s buttons”. Instead, I found the documentary evidence more helpful with regard to the issue of discrimination. That documentary evidence showed that Complainant expressed specific hygienic and sanitation concerns to her managers. Her beliefs with regard to the unsanitary conditions were both subjectively and objectively reasonable. It was clear from her testimony that correction of the conditions at the facility was most important to her. Moreover, based on the FDA guidelines, her concerns with the preparation and clean-up of food by food workers under sanitary conditions were consistent with FDA policy and guidance. Moreover, the time frame involved was a compressed one – fewer than three months – with the initial likely reduction in hours closely linked with Complainant not working in Store #484 when Mr. Montague was assigned to work there. Complainant’s contact with other employees and her opportunities to train new employees were also limited. Finally, Complainant’s concerns about Mr. Montague’s unsanitary habits were closely intertwined with the limitation on her hours, i.e., her disclosures to her supervisors were so intertwined with the actions they took, that she meets her burden of proof at the contributory stage. Ms. Horton complained about Mr. Montague and he complained about her. The supervisors determined that Complainant should not be scheduled in the same store at the same time as Mr. Montague.

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 Pacific Railroad Company*, 2010-FRS-030, ARB No. 13-034 (March 20, 2015) (citing *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008 STA-052, slip. op. at 5 (ARB Jan. 31, 2011); *Araujo*, 708 F. 3d at 158; *Hutton*, ARB No. 11-091, slip op. at 8; *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008)). A contributing factor may be proven by “direct evidence or indirectly by circumstantial evidence.” *Id.* (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. 6—7 (ARB Feb. 29, 2012.)).

Given the record, it is clear that Respondent’s decision to not permit Complainant to work at Store #484 *ultimately* reduced her hours and thus her pay, even, as Respondent argues, it added up to no more than \$300.

While A Reduction In Hours Could And Did Constitute An Adverse Action In The Instant Case Whether It Was Ended By Complainant’s Refusal to Work In A Particular Location, Respondent’s Offer To Reinstate Her Ability To Work at that Location, and Complainant’s Voluntary Resignation

Notwithstanding Complainant’s meeting the initial burden of proof by a preponderance of evidence, I must determine whether the Respondent showed by clear and convincing evidence that it would have taken the same action absent Complainant’s protected acts. This “clear and convincing” evidence standard:

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 stated earlier, Respondent chiefly argues that Complainant failed to show that her hours of work and thus her pay were, in fact, adversely affected by its actions. Respondent bases its argument on the variability in hours and fluctuation of events on a week-to-week basis. It cites to the fact that for the month of January, Complainant’s hours fluctuated from a low of 12 to a high of 26 and, from January 1 through her resignation on June 20, 2013, she averaged 14.3 hours per week. (RX 2, cited in Employer’s post-hearing brief at p. 3). Complainant’s final pay period was June 21, 2013 and she worked 14.42 hours during that final pay period. (Tr. at 84; RX 2).²⁶ In contrast, Complainant emphasizes the schedules of all Event Specialists from March through June 2013, and particularly those at Stores #484 and #5219. She also points to hours scheduled for new employee Russell Montague as opposed to the schedule of her own hours and points to an unfair preference for assigning him work at #484. In fact, during the less than three months’ time, or from post-March 2 through the second week of May, Montague worked a total of ten events according to Complainant’s records as opposed to five events worked by the Complainant. (CX 7).

In addition to the argument of fluctuating or seasonal CROSSMARK events at Walmart Stores is the fact of an “intervening” event, i.e. as of May 12, the Complainant informed Hamilton that she no longer wished to work at Store #484. (CX 35; Tr. at 50—51, 79). This would have removed her from any opportunities to work at Store #484, which, during May 23-26 had some eight events scheduled and four during the week of May 30-June 2. (CX 7). On June 4, Respondent lifted the restriction on her working at Store #484 and asked Complainant whether she wanted to be scheduled for four upcoming events at Store #484. (CX 37; RX-12; Tr. at 36,101). Complainant declined to be scheduled. (RX 12; Tr. at 51, 81 and 101). This action by Complainant broke the causation of events between any adverse action involving a cutting of hours that appeared to follow on the heels of her protected activity. *See Tracana v. Arctic Slope Inspection Service*, 1997-WPC-1, slip op. at 8 (ARB July 31, 2001); *Saporito v. Florida Power & Light Co.*, 1989-ERA-17 (ARB Aug. 11, 1998). It leaves in place a period slightly shy of three months when the Complainant could justifiably argue that her hours were reduced, including one four-day weekend, from March 14-17, when she made clear that she was totally unavailable for work. (CX 26).

Calculation of back pay must be reasonable and based on the evidence. However, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 1995-STA-43, slip op. at 11, n.12 (Sec’y May 1, 1996. Any uncertainty

²⁶ This would have equated to two events. Complainant did not put in any event schedule for this period of time. *See* CX 7.

concerning the amount of back pay should be resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, 1990-STA-37 (Sec'y June 3, 1994); *Kovas v. Morin Transport, Inc.*, 1992-STA-41 (Sec'y Oct. 1, 1993). According to my calculations, Complainant, given her schedule, availability, and employer practice to share the events among the workers, would have worked an additional three events during the two and a half month period that she was available for work but not scheduled. This equates to approximately twenty-four hours at a rate of \$11.00 per hour or a total of \$264.00, a total close to the estimate of \$300.00 provided by the Respondent.

Compensatory Damages

Complainant requests \$1500.00²⁷ in other compensatory damages for pain, suffering, and emotional distress.²⁸ (CX 2). At the hearing, Complainant testified to “the insult of that written counseling form” and the untrue statements that she had a bad relationship with management. (Tr. 40). She also testified convincingly as to her passion for her work, her concern for health issues, and her treatment by CROSSMARK as it concerned what she described as a good working relationship with the Walmart store managers with whom she worked.

To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010)) (affirming ALJ’s award of \$50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2—3 (ARB Apr. 22, 2013). Reasonable emotional distress damages may be based “solely upon the employee’s testimony.” *Ferguson*, ARB No. 10-075, slip op. at 7—8. Nonetheless, a “key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.” *Hobby*, ARB Nos. 98-166, -169, slip op. at 32.

On the evidence before me, I find Complainant has established by a preponderance of the evidence she experienced some emotional distress and mental suffering because of the change in hours scheduled and the written counseling memo, however, such distress was not entirely due to the Respondent’s adverse action, and any award of compensatory damages for pain and suffering must account for this fact. Complainant only worked a part-time schedule, was engaged, at times, in needlessly critical and argumentative behavior towards co-workers and supervisors, contributed to her losses by removing herself from Store #484, even though CROSSMARK advised her that she could continue to work there, the period of time involved was less than three months, and she voluntarily resigned. The emotional distress experienced by Ms. Horton in this case does not approximate the situation in *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2—3 (ARB Apr. 22, 2013), where the court found Complainant had suffered emotional distress quantifiable as \$4,000.00. Here, I find \$250.00 to be an appropriate amount to cover Complainant’s compensatory damages.

²⁷ Initially, in her Prehearing statement, she sought \$2500.00 in compensatory damages. See also Tr. at 10.

²⁸ Complainant does not seek punitive damages. Regardless, there is no evidence that Respondent acted with callous disregard of Complainant’s rights that would warrant an award of punitive damages.

Attorney Fees

Finally, as a prevailing party, Complainant is entitled to recover litigation costs and expenses.²⁹ An itemization of such costs and expenses, including supporting documentation, must be submitted by Complainant to Respondent within thirty days from the date of this Order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant. The parties shall confer before presenting me with the documents.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED**, that:

1. Respondent shall pay Complainant back pay in the amount of \$264.00 with interest.
2. Respondent shall pay Complainant the sum of \$250.00 in compensatory damages.
3. Complainant shall have 30 days from the date of this Decision to file a fee petition.

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge

²⁹ However, as Complainant appeared pro se, attorney fees are not available.

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).