



Issue Date: 10 September 2014

Case No.: 2014-FDA-2

In the Matter of:

Angela West,
Complainant

v.

HyVee, Inc.,
Respondent

RECOMMENDED ORDER OF DISMISSAL

This claim involves a complaint filed by the Complainant under the employee protection provisions of the FDA Food Safety Modernization Act, 21 U.S.C. § 399(d). The Complainant's complaint was dismissed by the Secretary on November 20, 2013, and by telefax sent on December 20, 2013, the Complainant appealed and requested a hearing. The matter was assigned to me, and on January 14, 2014, I directed the parties to advise me within three days of receipt as to a suggested hearing location and estimated duration of the hearing, whether the caption correctly identified the parties, and whether the time constraints associated with the handling of the case were waived due to the need for additional discovery and trial preparation time.

The Respondent submitted its response by letter dated January 21, 2014, received January 28, 2014; the Claimant did not respond. On February 12, 2014, I issued an Order to Show Cause, providing the Claimant ten days to show cause as to why her claim should not be dismissed as abandoned. On February 20, 2014, the Claimant submitted a response by telefax, indicating that she had talked with Mr. Igor Volynets, my law clerk, who told her the Court had not received her response to my Preliminary Order. She stated that she had tried to file her response on February 11, 2014, and attached a fax cover page dated January 30, 2014, a letter dated January 21, 2014, and a fax transmission verification report.

On April 22, 2014, I issued a Notice of Hearing and Prehearing Order, scheduling this hearing to begin on July 22, 2014, in Kansas City, Missouri. My Prehearing Order directed the parties to exchange, *inter alia*, a pre-hearing submission containing a simple statement of the issues of fact or law, and a list of witnesses the parties expected to call and a brief summary of their testimony. In addition, the parties were directed to exchange copies of the documents they expected to offer into evidence.

By letter dated July 1, 2014, the Respondent submitted its witness list, exhibit list, its statement of the issues, and a motion for summary judgment. The Complainant did not communicate with the Court or Respondent's counsel after her February 20, 2014 submission in response to my Order To Show Cause. Mr. Volynets made numerous attempts to contact the Complainant at the telephone number she provided, as well as the email address she provided, to discuss scheduling and other issues.¹ On several occasions, the telephone was answered by a relative, who agreed to pass a message to the Complainant to contact Mr. Volynets. Mr. Volynets confirmed with Respondent's counsel that they had been unable to contact her, and had not had any communication with her for several months.

On July 16, 2014, at my request, Mr. Volynets left a telephone message, followed by an email message, that if the Court did not hear from the Complainant by noon on July 17, 2014, the hearing would be cancelled. Shortly thereafter, the Complainant contacted Mr. Volynets, and it became apparent that she was not at all prepared to go forward with a hearing. Among other things, she claimed that she had lost her Notice of Hearing and Prehearing Order, and she attempted to ask Mr. Volynets about what witnesses she should call, and what evidence she should produce at the hearing.

The Complainant also submitted, on July 17, 2014, by telefax, a letter with 83 pages of attachments, requesting a continuance. She stated that she would like legal representation in order to present the facts and submit evidence correctly.

Under those circumstances, I concluded that it would not be an appropriate expenditure of the Court's resources (or the Respondent's resources) to proceed with the scheduled hearing. The hearing was cancelled, over the Respondent's objections, and I provided the Claimant thirty days to submit a response to the Respondent's Motion for Summary Judgment, and the Respondent fourteen days from receipt of the response to submit any reply.

In its motion for summary judgment that was filed on July 8, 2014, the Respondent argued that even if all of the Complainant's allegations are true, that is, that the Respondent terminated her employment because its managers believed she made a complaint to the Health Department when she did not do so, she has failed to state a *prima facie* case, because she has not alleged that she engaged in protected activity.

On July 23, 2014, at my request, Mr. Volynets attempted to contact the Complainant to make sure that she had a copy of the Respondent's motion for summary judgment, and that she understood that she needed to submit a response. Mr. Volynets emailed the Complainant a copy of the motion, and left a voicemail on one of the numbers the Complainant provided, explaining that she would need to submit her response within thirty days from July 17, 2014. Mr. Volynets also attempted to contact the Complainant at a second number she had provided, but could not leave a message because the voicemail box was not set up.

¹ Specifically, Mr. Volynets left messages three times at the telephone number the Complainant provided, and contacted her by email eight times after March 11, 2014 regarding her hearing availability and her prehearing submissions.

On August 22, 2014, Mr. Volynets received a call from the Complainant, stating that she had received my most recent “letter,” and was confused about what she should do. The Complainant stated that she had recently moved and was involved in an ongoing custody court dispute. She stated that she had not checked her email for five weeks. Mr. Volynets explained what my Order required, and emailed her another copy. The Complainant told Mr. Volynets that she would try to submit a short letter in response to the summary judgment motion by the end of the day. Mr. Volynets advised the Claimant that more than thirty days had passed since the issuance of my Order, and that it would be up to the Court to decide how the case would proceed.

On that same day, August 22, 2014, the Complainant submitted by telefax her Motion for Summary Judgment and Memorandum in Support.² In this Motion, she claimed that she was threatened and harassed by Respondent’s employees and managers into telling the OSHA investigator that she did **not** call the Health Department, when in fact she **did** call the Health Department to describe the filthiness, cross-contamination, and bad hygiene techniques used by Respondent’s employees. She did not further elaborate on the “threats and harassment” that led her to lie to the OSHA investigator, or identify the persons or persons she claimed told her to lie to the OSHA investigator. The Complainant did not address any of the arguments raised by the Respondent in its motion for summary judgment.

On September 3, 2014, the Respondent submitted its reply, arguing that its motion establishes that the Complainant did not engage in protected activity, and her complaint should be dismissed.

The Respondent also argued that the Complainant’s claim should be dismissed for failure to prosecute and for making misrepresentations to the OSHA investigator and the Court. Respondent argued that it spent thousands of dollars drafting required submissions and preparing for the hearing that the Complainant requested. Despite the fact that the Respondent did not agree to a continuance, the Court granted the Complainant’s request to continue the hearing because she was not prepared to proceed. The Respondent requested that the Court dismiss this claim for lack of prosecution and abuse of process.

On September 8, 2014, the Complainant sent an email to Mr. Volynets, stating:

To Whom It May Concern:

I am emailing you in regards to the Summary Judgment response by Hy-Vee. There is a correction that needs to be made to my response letter I DID NOT call the Health Department but made a typo in my typing my letter. I have been harassed by Hy-Vee’s employees ever since I’ve made my initial complaint with OSHA-DOL Whistle blower investigation department. And have been pressured to say that I had called the Health Department in order for this case to be dismissed. I wish to continue at this time to pursue the case. Some of the witnesses I wanted to speak on my behalf still works for Hy-Vee and are afraid of losing theirs [sic] jobs if they come forward.

Sincerely,
Ms. West

² There is no indication that the Claimant has retained an attorney to represent her in these proceedings.

DISCUSSION

The Complainant was hired by the Respondent to work as a kitchen clerk at one of its stores in Overland Park, Kansas. In her complaint filed with OSHA, the Complainant made a number of allegations of various adverse employment actions. The Complainant claimed that her hours were reduced, and she was terminated, because she wrote a letter to Respondent's corporate office on May 14, 2013, raising a number of concerns, one of which related to food safety in the kitchen area, and because the Respondent's managers assumed that she had made a complaint to the Health Department, when she did not make any contact with the Health Department.

The whistleblower provisions of the Food Safety Modernization Act (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.

21 U.S.C. §399d(a).

In this case, in her complaint to OSHA, and her submissions to the Court, and up until her response to the Respondent's motion for summary judgment, the Complainant has repeatedly and specifically denied that she contacted the Health Department as the Respondent "assumed." Nor did she allege in her complaint that she was "about to provide or cause to be provided" any information to the Health Department. Thus, in its motion for summary judgment, the

Respondent argues that the Complainant has not alleged facts that if true would support a finding that she engaged in protected activity by providing information to the Health Department.³

After the Respondent submitted its motion for summary judgment, arguing that the Complainant did not engage in protected activity because she claimed she did **not** call the Health Department, the Complainant submitted an untimely pleading claiming, for the first time, that she **did** contact the Health Department, but was harassed and intimidated into telling the OSHA investigators that she did not.⁴ The Complainant ignored the Court's Order to respond to the Respondent's motion for summary judgment by August 18, 2014, and when she finally did respond, her only argument was that the Respondent's motion should not be granted because it was based on her representation that she did not contact the Health Department, which she now claimed was a lie.

The Complainant did not provide any further information on the specifics of this alleged harassment and intimidation. She did not explain how Respondent's employees were able to harass and intimidate her into lying to the OSHA investigator, or in how the Respondent even knew she was going to make a complaint to OSHA and was thus able to harass and intimidate her into lying to OSHA about her claim.

I note that the Complainant actively disputed the "assumption" by Respondent that she had contacted the Health Department; she has consistently claimed that she did not do so, both to OSHA, and in her pleadings submitted to this Court.⁵ In other words, if one were to credit the Complainant's August 22, 2014 pleading, she lied repeatedly, to the OSHA investigator, and to this Court. She did not correct this lie on the eve of hearing, or when she requested a continuance, but only when she was faced with the Respondent's motion, and apparently concluded that in order to prevail, she needed to allege that she had engaged in protected activity by contacting the Health Department.

After receiving the Respondent's response to her August 22, 2014 pleading, requesting that her claim be dismissed for abuse of process, in her September 8, 2014 email, the Complainant changed her story once again, this time claiming that she made a "typo" in her August 22, 2014 pleading: she did NOT call the Health Department. However, the Complainant's statements in her August 22, 2014 pleading cannot by any stretch be characterized as "typos." In that pleading, the Complainant stated:

I, Angela West filed a claim explaining that the Hy-Vee managers [*sic*] assumed that I have called the Health Department. I was threatened and harassed by Hy-Vee employees and managers into telling the DOL-OSHA investigator Mr. Mike Oesch that I did not

³ It is conceivable, as noted by the OSHA investigator, that if it were established that the Respondent terminated the Complainant's employment based on a mistaken belief that she had made complaints to the health department, this would be sufficient to establish that she had engaged in protected activity.

⁴ In its motion for summary judgment, the Respondent did not address the May 14, 2013 letter that the Complainant sent to Respondent's corporate office, other than to argue that the purpose of that complaint was to allege favoritism, not to make a complaint under the FSMA. However, in this letter, the Complainant made complaints about violations of food safety rules, which could be found to constitute protected activity.

⁵ As the Respondent notes, the Complainant has referred to the Respondent's assumption that she contacted the Health Department as "gossip," "allegations," and "rumors."

called the health department. Which in fact I did call the health department to describe the filthiness, cross-contamination, and the bad hygiene techniques that the employees were using.

The Complainant then quoted from the Respondent's motion, which stated that her only allegation of protected activity was that the Respondent's managers assumed that she made a complaint to the Health Department. She stated that her allegations of protected activity should be protected, and that "due to that fear (of threats and harassments) I had told the OSHA investigator what Hy-Vee told me to tell him which was a lie."

In her September 8, 2014 email, the Complainant claimed that she had been "pressured" to say that she called the Health Department "in order for this case to be dismissed." Again, she did not provide any specifics on this alleged "pressure," or explain how Respondent's employees were able to "pressure" her when she no longer worked there.

DISCUSSION

Formal hearings on FDA complaints are to be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of the Administrative Law Judges promulgated at 29 C.F.R. § 18. The authority of an administrative law judge to conduct a fair and impartial hearing is set forth in 29 C.F.R. § 18.29. Generally, an administrative law judge is authorized to take any action authorized by the Administrative Procedure Act, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, and to do all other things that are necessary to enable the administrative law judge to discharge the duties of the office. 29 C.F.R. § 18.29(a)(6, 8, 9).

The Supreme Court has recognized that federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). In that case, the Court stated that:

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson*, 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Thus, courts have recognized that a district court has the inherent authority to sanction conduct that abuses the judicial process. *Chambers v. NASCO, Inc.*, *supra*, 501 U.S. 32 at 44-

45; *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir.2003). The sanction imposed should be proportionate to the gravity of the offense. *Allen v. Chi. Transit Auth.*, 317 F.3d 696, 703 (7th Cir.2003).

The Complainant has now changed her story twice, both times in response to dispositive motions submitted by the Respondent. It is not possible to determine which version is in fact the truth, but it is clear that one of them is a lie. This is not a matter of assessing the credibility of a witness faced with previous inconsistent statements. *See, e.g., Montano v. City of Chicago*, 535 F.3d 558, 563 (7th Cir. 2007). The Complainant knowingly lied to the Court about a material matter. It is reasonable to infer that she did so in order to conform her version of the facts to one she believes would allow her to avoid dismissal of her claim. I find that the Complainant's conduct was willful and malicious, and a deliberate fraud on this Court.

It is not appropriate to grant the Respondent's request for summary judgment, as there are clearly contested issues of fact. Specifically, it is not clear whether the Complainant made a complaint to the Health Department or not, although it is clear that either way, the Complainant has lied about it to the Court. In addition, the Complainant has alleged that she sent a letter to Respondent's corporate office on May 14, 2013, which included claims that could qualify as protected activity. Under these circumstances, where there are material facts in dispute, summary judgment is not warranted.

However, this Court has the authority to preserve the integrity of the hearing process. While the Complainant, who is proceeding *pro se*, is entitled to some latitude, she is not entitled to lie to the Court, and to manipulate and abuse the hearing process. The Complainant has ignored the Court's procedural orders, failed to respond to repeated attempts to contact her, and failed to timely respond to directives from the Court.⁶ Most importantly, she has lied about essential facts surrounding her claim, causing the Court and the Respondent to expend resources unnecessarily. I find that the Complainant's complaint should also be dismissed on grounds of abuse of process.

CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that the Complainant's complaint in this matter is DISMISSED.

⁶ As set out above, the Complainant failed to observe the requirements of my prehearing order, or even to respond to the attempts by Mr. Volynets to contact her. Because she was so clearly unprepared to proceed, the hearing was cancelled. It was not until Mr. Volynets contacted her that the Complainant submitted her untimely response to the Respondent's motion for summary judgment. While this clearly reflects the Complainant's disregard for the Court's directives, it is her willful lies to the Court that have tipped the balance to a finding that her claim should be dismissed.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶5.c.(46) of Secretary's Order 02-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69377 (Oct. 19, 2012) (published Nov. 16, 2012). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the FDA Food Safety Modernization Act, 21 U.S.C. § 399d. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.