



**Issue Date: 01 October 2015**

**Case No. 2015-FDA-00007**

*In the Matter of:*

**SHEVALLA K. ELLIS,**  
*Complainant*

v.

**GERBER FOODS.**  
*Respondent.*

**ORDER OF DISMISSAL**

This matter arises under Section 402 of the FDA Food Safety Modernization Act (“FSMA”), 21 U.S.C. § 399d, and the regulations at 29 C.F.R. Part 1987. The FSMA provides, in part, whistleblower protection for employees of entities engaged in the manufacture, packing, transporting, distribution, reception, holding, or importation of food for, *inter alia*, providing information regarding a violation of a federal law or regulation. 21 U.S.C. § 399d(a)(1). If a covered entity discriminates against its employee for engaging in protected activity, that employee must file an action with the Occupational Safety and Health Administration (“OSHA”) “not later than 180 days after the date on which the violation occurs.”<sup>1</sup> 21 U.S.C. § 399d(b)(1).

On May 4, 2015, Shevalla Ellis (“Complainant”) filed a complaint with the Secretary of Labor (“Secretary”), alleging that Gerber Foods (“Respondent”) terminated her employment on July 15, 2014 because of food safety concerns that she had brought to management’s attention.<sup>2</sup> On July 13, 2015, OSHA, acting on behalf of the Secretary, dismissed the complaint as untimely filed, finding that Complainant’s May 4, 2015 complaint was filed more than 180 days after

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<sup>1</sup> The filing period begins when the discriminatory decision has been both made and communicated to the complainant. That is, the 180-day period begins when complainant receives “final, definitive, and unequivocal notice” of an adverse action. *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9, at 2-3 (ARB Apr. 3, 2007) (citing *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 3 (ARB Aug. 31, 2005)). A notice is “final” if it leaves “no further chance for action, discussion, or change.” *Rollins*, ARB No. 04-140, at 3. Notice is “unequivocal” when the employer’s communication is unambiguous or “free of misleading possibilities.” *Ibid*. There is no apparent dispute that the filing period in this matter began on July 15, 2014.

<sup>2</sup> Complainant’s concerns included food contamination and the falsification of documents to conceal inadequate testing.

Respondent removed her from service and discharged her on July 15, 2014 for allegedly reporting concerns about potential food contamination (“Findings”).

On July 22, 2015, Complainant filed a letter with U.S. Department of Labor, Office of Administrative Law Judges (“OALJ” or “Office”) objecting to the Findings and seeking a hearing before an administrative law judge. On August 10, 2015, this Office issued a *Notice of Docketing and Order to Show Cause Why Matter Should Not Be Dismissed As Untimely Filed* (“Order”). The Order directed the parties to file briefs addressing the question of whether Complainant’s FSMA complaint was timely filed with OSHA, i.e., within 180 days after the alleged violation occurred, or why the time for filing should be equitably tolled. The Order required the briefs to be delivered no later than the close of business on August 25, 2015.

On August 24, 2015, Respondent filed a brief in response to the Order. Respondent stated that Respondent had given “final, definitive, and unequivocal notice to [Complainant] of her discharge” on July 15, 2014, and that the 180-day period began to run from that date. Respondent further stated that equitable tolling would not be proper in this situation because Respondent “did nothing to mislead [Complainant] regarding her alleged cause of action”; “there is no evidence that [Complainant] has been in some extraordinary way prevented from asserting her rights”; and “there is no evidence that [Complainant] raised the precise statutory claim . . . to the wrong forum.”

As of the date of this Order, Complainant has not filed a responsive brief.<sup>3</sup> In the August 10, 2015 Order, Complainant was warned that “[f]ailure . . . to establish that her complaint was timely filed with OSHA will result in dismissal of her complaint.”

The regulations at 29 C.F.R. § 18.57(b) provide that:

If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that

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<sup>3</sup> On September 14, 2015, Complainant filed with this office the first page of a letter from the National Labor Relations Board (“NLRB”), which detailed how to file a *Charge Against Labor Organization*. I note that in her July 22, 2015 request for a hearing, Complainant references writing a “confidential witness affidavit” on February 17, 2015 for the NLRB. However, the subsequent NLRB letter provided by Complainant did not include a date, and no explanation was given as to its context or relevance to the complaint. Additionally, a date of February 17, 2015 would still put the complaint outside of the 180-day period. Additionally, I note that although Complainant’s initial request for a hearing alleges dates in 2013 where she reported company behavior, it is the complaint alleging retaliatory adverse action that is relevant for calculating the 180-day period under the FSMA. Finally, as the complaining party, it is Ms. Ellis’s burden to demonstrate why equitable principles should be applied to toll the limitations period. *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). However, as a pro se complainant lacking legal expertise, this Court analyzed Ms. Ellis’s complaint “with a degree of adjudicative latitude.” *Hyman v. KD Resources, Inc, et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip. op. at 8 (ARB March 28, 2010) (citing *Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008)). Regardless, Ms. Ellis has not produced sufficient evidence invoking equitable principles that would justify tolling the limitations period in this case.

the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; (iv) Staying further proceedings until the order is obeyed; (v) Dismissing the proceeding in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

In light of the foregoing, it is hereby **ORDERED** that Respondent's request for hearing is hereby **DISMISSED**.

**SO ORDERED.**

**STEPHEN R. HENLEY**  
Acting Chief Administrative Law Judge

## **NOTICE OF APPEAL RIGHTS**

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1987.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1987.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1987.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal

brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1987.109(e) and 1987.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1987.110(b).