



Issue Date: 29 August 2016

Case No.: 2015-FDA-00001

In the Matter of:
LAN FARLEY,
Complainant,

v.

ALTASOURCE, LLC, d/b/a,
META LABS, LLC,
Respondents.

Appearances:

Drew Mosley, *Esq.*
The Law Offices of Drew Mosley
Lawrenceville, Georgia
For the Complainant

William Piercy, *Esq.*
Berman, Fink, Van Horn, P.C.
Atlanta, Georgia
For the Respondent

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee-protection provisions of § 402 of the Food, Drug, and Cosmetic Act, § 1012, as amended by the FDA Food Safety and Modernization Act, Section 402 of Public Law 111-353, 21 U.S.C. § 399d (hereinafter the “Act” or “FDA”). The regulations implementing the Act are found at 20 C.F.R. Part 1987. The Act provides whistleblower-protection for employees of entities engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food. 21 U.S.C. § 399d (a).¹

¹ When the OSHA investigated this case, the Regional Administrator, acting as an agent for the Secretary of Labor, considered a complaint under the Solid Waste Disposal Act (“SWDA”), 42 U.S.C. 6971. The regulations implementing the SWDA are found at 29 C.F.R. Part 24. By order dated November 5, 2015, the undersigned notified the parties of his unsuccessful attempt to get an SWDA number assigned to this case. The undersigned notified the parties that he would “allow the development of evidence, testimony, and argument regarding any

PROCEDURAL HISTORY

By cover letter dated April 7, 2014, Lan Farley (the “Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Meta Labs (the “Respondent”) terminated her on March 21, 2014 because she raised safety concerns that “the company did not really want to hear.” (ALJX 3.)

OSHA initiated an investigation under the FDA and the SWDA. By letter dated January 6, 2015, OSHA’s Regional Supervisory Investigator informed the Complainant that it found no reasonable cause to believe that the Respondent violated the FDA or SWDA. (ALJX 4.) Specifically, OSHA found that the Complainant’s assertion that prior to her termination she raised concerns regarding expired chemical ingredients in the lab/production areas, and chemical waste improperly poured down the drain, was not supported by any corroborative “witness statement or contemporaneously created written record.” (*Id.* at 2.) Moreover, OSHA stated that investigative efforts corroborated the Respondent’s position that the Complainant was terminated because she failed to demonstrate proficiency in FDA regulatory matters. (*Id.*) Consequently, OSHA dismissed the Complainant’s complaint.

By letter dated February 5, 2015, the Complainant filed objections to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges. (ALJX 5.) On June 19, 2015, I issued a Notice of Hearing and Prehearing Order. Thereafter, the hearing was continued twice. I held a hearing on this claim on January 28 and 29, 2016, in Atlanta, Georgia. I afforded both parties a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges. 29 C.F.R. Part 18A (2015). At the hearing, Administrative Law Judge Exhibits (“ALJX”) 1-10, Joint Exhibits (“JX”) 1-13, and Claimant’s Exhibits (“CX”) 1 were admitted into the record without objection. (Tr. at 7-16, 221.)²

In reaching a decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the hearing testimony, and arguments of the parties. Where applicable, I have determined the credibility of the testimony of record.

potential violation of, cause of action under, or remedies available to the Complainant as included in the SWDA.” However, neither party presented evidence of SWDA violations nor addressed the SWDA in post-hearing arguments. Therefore, despite OSHA’s consideration of SWDA violations, this Decision and Order addresses only the Complainant’s alleged cause of action under the FDA.

² At the hearing, the following Joint Exhibits were admitted into the record: (1) An e-mail dated March 19, 2014 from the Complainant to Mr. Khayat (JX 1); (2) an e-mail dated March 20, 2014, sent at 3:37 p.m., from the Complainant to Mr. Khayat and Ms. Hunt (JX 2); (3) an e-mail dated March 20, 2014, sent at 4:22 p.m., from the Complainant to Mr. Khayat (JX 3); (4) a Separation Notice, dated March 25, 2014 (JX 4); (5) the Complainant’s cover letter and resume (JX 5); (6) An e-mail dated March 20, 2014, sent at 12:37 p.m., from the Complainant to Mr. Khayat and Ms. Hunt (JX 6); (7) a “New and Improved Scheme for Production Area” (JX 7); (8) a memo highlighting the Complainant’s work (JX 8); (9) a letter from the Complainant to OSHA, dated April 6, 2014 (JX 9); (10) a letter from the Complainant to OSHA, dated April 6, 2014 (JX 10); Meta Labs’s Product List (JX 11); (12) a Department of Health and Human Services inspection report, dated January 21, 2014 (JX 12); and (13) a Violation Abatement Certification from OSHA to Mr. Khayat (JX 13). Moreover, CX 1, the Complainant’s notes pertaining to 21 C.F.R. Part 111, was admitted into the record at the hearing.

ISSUES

1. Whether the Complainant engaged in activities protected under the FDA by providing to the Respondent information related to any act or admission which she reasonably believed to be a violation of any provision of the FDA or an order, regulation, standard, or ban under the FDA;
2. Whether the Complainant has demonstrated by a preponderance of the evidence that her protected activity was a contributing factor in the Respondent's decision to terminate her;
3. Whether the Respondent has shown by clear and convincing evidence that it would have discharged the Complainant even in the absence of her protected activity;
4. Whether the Complainant took reasonable steps to mitigate her damages; and
5. Whether the Complainant is entitled to reinstatement, compensatory damages, attorney fees and costs, emotional distress, expungement of adverse information in the personnel file, and/or abatement.

(Tr. at 17-18.)

STATEMENT OF THE CASE

The Respondent is a company located in Roswell, Georgia that manufactures and distributes dietary supplements and cosmetics. (Tr. at 164-165.) The Respondent hired the Complainant on March 10, 2014, and terminated her eleven days later, on March 21, 2014.

The Complainant alleges that she was terminated for raising concerns that the Respondent was not creating proper certificates of analysis, performing internal tests, and calibrating instruments. (Brief of Complainant at 1-2; Tr. at 24.) Moreover, she alleges that she informed the Respondent that it was not in compliance with 21 C.F.R. Part 111, and that she gave her supervisor a copy of her notes regarding the Respondent's noncompliance, as evidenced by CX 1. (Brief of Complainant at 2-3; Tr. at 37.)

On the other hand, the Respondent alleges that it hired the Complainant to ensure its regulatory compliance with the Act, after the Food and Drug Administration cited it for regulatory infractions in 2014. (Post-Hearing Brief of Respondent at 1; Tr. at 168.) The Respondent contends, however, that it terminated the Complainant's employment two weeks after hiring her not because she raised issues of noncompliance, but because she had made no substantive progress on the tasks assigned to her, misrepresented her qualifications, and simply did not follow instructions or perform the specific tasks she was assigned in the manner directed. (Tr. at 191-194; 204-205, 209.)

TESTIMONIAL EVIDENCE

Lan Farley's Testimony

The Complainant stated that she was hired by Meta Labs on March 10, 2014, and she worked there for two weeks. (Tr. at 20-21.) She testified that she was hired “to lift the company in compliance with the operation, in operation in manufacturing at that site.” (Tr. at 20.)

The Complainant testified that she has a degree in chemistry, and a background working for “many, many major companies,” as well as experience working “with cosmetic generic drugs, all the way to prescription drugs” since 1983. (Tr. at 24-25.) She agreed that JX 5 is a copy of her resume and cover letter. (Tr. at 25.) When asked whether she had experience working with federal regulations, she responded that she had “a lot of experience from 1983 until now.” (Tr. at 28.) She further agreed that she had experience working with FDA and OSHA regulations. (Tr. at 28-30.)

Alleged Violations

The Complainant asserted that while she worked for the Respondent, she raised safety concerns. (Tr. at 21.) In her opinion, the concerns that she raised contributed to her termination. (*Id.*) When asked whether she was trying to get the Respondent into compliance, she replied, “Yes. That’s—that’s why I am there.” (Tr. at 30.)

The Complainant discussed multiple perceived violations. She stated in her less than two weeks working for the Respondent she found “tons” of expired chemicals and saw recordkeeping violations caused because the Respondent “didn’t have a system set up” (Tr. at 22, 23). She also stated that the Respondent did not have “instruments” to test products. (Tr. at 26.) When asked whether she informed the Respondent of its alleged noncompliance with 21 CFR Part 111, the Complainant responded, “Yes.” Further, when asked whether she believed she was terminated for informing the Respondent of its alleged noncompliance, she stated, “Yes.” (Tr. at 37.) She testified that she made a corrective action plan “[b]y handwritten work” and was then terminated.” (Tr. at 32.)

With regard to the specific safety violations she allegedly found, the Complainant opined that the “in-process testing” that the Respondent was doing was not adequate and that the laboratory was, in fact, “not set up to do the testing.” (Tr. at 26-27, 75-76.) The Complainant also testified that she asked Mr. Khayat, the owner, to provide her with safety-data sheets for all ingredients present in the laboratory so the workers could access them. According to the Complainant, Mr. Khayat told her that he kept some of the safety-data sheets in his office, and that her request was not further acted upon. (Tr. at 33.) She also stated that “certificate[s] of analysis” were “not available.” (*Id.*)

The Complainant further testified that the Respondent had a quarantine area, but, in her opinion, the area was “not in the compliance.” (Tr. at 34.) When asked whether she saw products that should have been quarantined but were not, she responded by observing that there was no sign that said “quarantine area.” (Tr. at 110-111.) She testified that she went into the area

and “clean[ed] up” herself and “tr[ie]d to separate the chemical or the material that they store[d] in there.” (Tr. at 111.) She also alleged that material in the laboratory was out of date. (Tr. at 112.)

The Complainant further testified that chemicals that could and explode when mixed were not in separate flasks, and that they were not stored properly. (Tr. at 34-35, 110.) As to the Respondent’s chemical waste-disposal process, the Complainant testified that it was “short term” and that she observed some people “pour waste material right in the sink,” which she tried to stop. (Tr. at 35.) She also alleged that the Respondent’s facility had improper ventilation. (Tr. at 36.) She stated that the odor of menthol was very strong and there was “no ventilation” when she was there. (*Id.*) When asked whether she raised the issue of ventilation, she responded, “Yes, I sure did.” (Tr. at 36.) The Complainant also alleged that safety shoes were not implemented in the Respondent’s facility. (*Id.*) Specifically, she said “[n]o safety shoe[s],” “no hard hat[s],” and “no safety glass[es].” (Tr. at 36-37.) Finally, she testified that she raised a concern of “machinery running without power guard to protect the worker.” (Tr. at 37.)

According to the Complainant, the Respondent did not have a set of certified weights to calibrate the scale. (Tr. at 26-27.) She testified that the lack of calibration on the testing equipment was something she saw herself. She stated that in cleaning the laboratory she saw “ph” meters out of calibration. (Tr. at 108-109.) She stated that she asked the QA manager whether the company ever calibrated the meters and and was told, “No, we just use [them].” (Tr. at 109.)

The Complainant also discussed packaging and labeling. In her opinion, some of the Respondent’s labels were not in compliance with the regulations. (Tr. at 84.) When questioned regarding specifics, she stated, “I’ll just say like for particular product, they make claim on certain, you know, FDA, are not approved by FDA and the ingredient they’re using there, I check on their record, there’s no proven fact that they even test those. So the label claim is not exactly that they have the record to prove it, that they test every product or examine the product or amount they claim on the label.” (Tr. at 85.)

The Complainant further opined the Respondent did not have a system set up to prevent contamination. She gave an example regarding “batch cross[-]contamination,” stating that such contamination occurred when materials from one batch were are mixed with another without a procedure to make sure there is no carry-over or cross-contamination. Regarding holding and distributing dietary supplements to protect against contamination, the Complainant alleged that she did not see a procedure or protocol from the company. (Tr. at 101-102.) When asked whether she requested to see the written procedures, she stated, “Yes, because the QC and QA department they have don’t have that system set up. So all of these I spotted, I saw that they fail, I asked for that information. They could not show me.” (Tr. at 102.) When asked whether she concluded from that the documents did not exist, the Complainant responded, “I don’t see the procedure written up for how we handle or identify and quarantine return[-]product or out-of-spec product, and how we handle it.” (Tr. at 105.)

When asked whether most of conclusions regarding the Respondent’s alleged noncompliance came from her failure to “see things, see record keeping, see documentation, see

testing that you had seen in your other employment?” the Complainant responded, “No, I based on the requirement from FDA.” (Tr. at 106.) When asked whether she actually *saw* something being done that was non-compliant, she stated that when she took a tour she smelled a strong menthol odor. (Tr. at 108.) She stated, “So I go over there in operation, and I see no regulation, and they were boiling, boiling with heat coming up there, all that odor coming out. So I do have concern. And some of them come up to me and say, ‘I have headache,’ because they do not have appropriate regulation.” (*Id.*) She stated that on her tour, she saw “people pour, you know, waste into the sink. And I say, ‘Why do you pour the product through the sink.’ They say, ‘We do it all the time.’” (*Id.*)

When asked by the undersigned whether anything in the laboratory was toxic, the Complainant responded, “I find broken thermometer that had mercury, and the mercury sit in the drawer where they keep the thermometer.” (Tr. at 152.) When asked if there were others things that could be described as toxic, she stated, “acid and alkaline.” (Tr. at 153.) When asked which materials were poured down the drain, the Complainant responded, “Menthol.” (Tr. at 154.)

Termination

The Complainant testified that at the time she was terminated, she was doing her work and “thinking about set up a lab that put the instrument to test the active and inactive materials,” which she alleged was one of the things that she discussed with Mr. Khayat. According to the Complainant, Mrs. Khayat, the owner’s wife, came into her office on her last day. She described the conversation as follows:

[Mrs. Khayat] told me that I must put -- must get my person to leave the company immediately, and I was surprised. And then after she do that, she grab everything from my desk, and then Mrs. Khayat come in and she told me, “This is your last check and we going to mail you the second week check, and you must leave immediately.” They took all access over my desk. And then, I saw Ms. Hunt took all the stuff from my desk. And I took my purse and left. They do not give me anything like this.”

(Tr. at 46.)

When asked whether she was given a reason for the termination, she stated, “No, no reason.” (Tr. at 47.) When asked if she thought the reason for her firing was the fact that she had come forward with noncompliance and safety concerns, she responded, “I think when I give them all the handwritten notes about the concern and the corrective action, that the plan should immediately correct the action to comply with the agency, the government agency. When they get all that, and then, all the sudden I am fired.” (Tr. at 47.) She testified that she was referring to CX 1. (Tr. at 48, 71-73.) She testified that Ms. Hunt has the original copy of CX 1, as they were on her desk when she left the company. (*Id.*) She later stated she gave the notes to Ms. Hunt on March 17 or 18, and kept a copy for herself. (Tr. at 49-50.) She explained the notes were her response to Ms. Hunt’s questions about her productivity. On cross-examination, when questioned, “And nowhere in C-1 do you expressly state that there are expired chemical

ingredients in the lab, do you?” the Complainant responded, “On this here, no.” (Tr. at 120-121.) When asked further, “And nowhere in C-1 do you expressly state your concern about expired chemical ingredients in the lab and production area?” she responded, “No.” (Tr. at 121.)

When asked whether she followed the instructions she was given when she was working for the Respondent, she responded:

Yes. They told me to work for the R and D, and work with QA/QC and set it up, and try to find can I improve the system with my audit, with my finding. I do everything in my sort time without the tools to do everything I could, try to improve and make that plant in compliance. But I didn't have enough time. I did not have the right tools to work with. But I overcome that, and I came up with a lot of improvement plan for them.

(Tr. at 113.) She stated that nobody ever told her she was not following instructions. (*Id.*) She also alleged she was never told that she was not qualified. (*Id.*) She identified those to whom she relayed her concerns as Mr. and Mrs. Khayat and Ms. Hunt. (Tr. at 114.) When asked whether all of her complaints were verbal, she stated, “More likely at the time. I don't have any written.” (*Id.*) Specifically, she testified as follows:

JUDGE SELLERS: You told them, “I have a concern that we are not FDA compliant.”

THE WITNESS: Yeah, I do. I do tell them that the plan is out of compliance as far as FDA, OSHA or even EPA.

JUDGE SELLERS: And you told that in conversations with Mr. Khayat and Ms. Khayat.

THE WITNESS: We have a meeting.

JUDGE SELLERS: And Samantha Hunt.

THE WITNESS: Yeah. We have such-and-such meeting with them, Samantha Hunt and Mr. Khayat. Ms. Rosa, she's not so much involved with us. She's just the only person that's there who will tell me to leave the company immediately.

JUDGE SELLERS: When you had these conversations and you told them that, what was their response?

THE WITNESS: No response. I didn't understand what they're thinking at the time. I just voice my concern. I didn't hear no response.

(Tr. at 114-115.) She stated that when she proposed an instrumentation laboratory for equipment, Mr. Khayat said, “Well, work in that direction.” (Tr. at 115.) She stated she called a different supplier to get information and then got fired. (*Id.*)

On cross-examination, when asked whether she gave written notice to Mr. Khayat or anyone else at the company about her concerns about expired chemical ingredients in the laboratory, the Complainant responded, “I sure did,” and then added, “Well, that, it's my note,”

referencing CX 1. (Tr. at 118.) On cross-examination, when asked whether she had any pictures of expired chemicals in the laboratory, she responded, “No, not really.” (Tr. at 122.)

When asked whether the record contained “one writing, one picture, one voice mail expressing [her] serious concerns about public safety and employee safety for the entire duration of your employment with” the Respondent, the Complainant replied that she had made a handwritten note “on the diagram,” “c[a]me up with plan A, B, C,” and “gave it to” Mr. Khayat. (Tr. at 124-125.)

Finally, when asked whether she could have sent her concerns to Mr. Khayat regardless of whether she had a computer, she stated, “Those study, I have a meeting with them every day to voice the concern, because I do not have equipment or the computer or even access to e-mail to send him.” (Tr. at 127.) She stated that “every time” she had a meeting, she “let them know that we are failed to meet comply with FDA, or where we have order by OSHA, we can meet OSHA or EPA.” (Tr. at 128.)

Sam Khayat’s Hearing Testimony

Sam Khayat is the owner and president of Meta Labs, which manufactures and distributes dietary supplements and cosmetics and employs 15 people. (Tr. at 164-165.) He stated the facility consists of offices for sales, production facilities, and a laboratory in an 18,500 square foot building. (Tr. at 164-165.) He stated that “since manufacturing does not carry hazardous material or hazardous waste,” he was allowed to open his manufacturing facility in the same facility.

Mr. Khayat testified that the Food and Drug Administration inspected Meta Labs twice, the first time being in 2012. (Tr. at 166.) He stated the inspector showed up unannounced and “saw a couple things that were not right,” and told him which things needed “to be taken care of.” (*Id.*) Mr. Khayat stated that the deficiencies were fixed the following day. (*Id.*) According to Mr. Khayat, the inspector further notified him that he did not “have [a] good documentation system,” which needed to be rectified. Moreover, the inspector stated that some of Meta Labs’ “labels made claims that...were so-called medical claims,” which needed to be corrected. Mr. Khayat stated that he corrected those problems. (Tr. at 166-167.)

Following the FDA’s inspection, Mr. Khayat hired a chemist, Niraja Shaka; a quality control manager, Samantha Hunt; and an expert with FDA regulations, Steve Neri. (Tr. at 167, 173.) He testified that Mr. Neri was hired to make Meta Labs compliant with FDA regulations pertaining to dietary supplements. (*Id.*)

Mr. Khayat testified that the Food and Drug Administration inspected Meta Labs again in January of 2014. Through the inspection, Mr. Khayat discovered that, according to the inspector, Mr. Neri had set up procedures for a medical device company—not a dietary supplement company. (Tr. at 168.) Mr. Khayat testified that JX 12 contains the Food and Drug Administration’s findings following their second inspection, after spending “about a week in our facility inspecting everything.” (*Id.*) Following the inspection, Mr. Khayat testified that he discharged Mr. Neri because “he did not do his job that he was hired to do.” (*Id.*)

Thereafter, Mr. Khayat testified that he started looking for somebody else who could do the job. He received a call from the Complainant, who had spoken to one of his customers. (Tr. at 169.) He agreed that JX 5 is the resume he received from the Complainant. (*Id.*) Mr. Khayat interviewed her for 30 minutes and “talked about her knowledge of dietary supplement[s], FDA regulation[s] and GNP requirements.” (Tr. at 170.) He testified that she “said that she knew all those things, [that] she’s an expert in all these things.” (Tr. at 170, 239.) When asked whether he told her about the FDA’s prior visits to Meta Labs, he stated he did so during the interview. “Yes, that’s why I hired her, I told her. I explained to her the reason she is being hired, because I had a consultant before her that did not do the job because the FDA has cited us for not complying with certain things.” (*Id.*) When questioned by the undersigned, Mr. Khayat stated, “I told her that we had warning letter from the FDA, and we had issue with regulations, and I needed her to go in there and correct the problems, see what the problems [were], and get us into compliance.” (Tr. at 240.)

Mr. Khayat testified that the Complainant sat at a prior employee’s desk, which had a computer that was connected to Meta Labs’ network. (Tr. at 171.) According to Mr. Khayat, on her first day of employment, the Complainant complained to two other employees that her computer was too slow, and she also made clear that she did not want to share it with Ms. Hunt. (Tr. at 173-174.) Mr. Khayat testified that he bought the Complainant a new computer, which she got on March 17, and she had access to the server on March 18. (Tr. at 181-182, 234.) On cross-examination, he stated that the computer the Complainant was given initially “was functional” and was “used by the previous chemist.” (Tr. at 204.)

According to Mr. Khayat, when the Complainant began working, he asked her to look at the procedures and tell him what needed to be corrected in order to become FDA-complaint. (Tr. at 172.) He testified that, after the Complainant complained about her computer, he asked her to “go into the plant,” “observe the operation,” “note what” she saw, and indicate what Meta Labs needed “to correct” until he could find a computer that she wanted.

Mr. Khayat stated that the next time he spoke with the Complainant was after he heard from other employees that she was “walking around [the plant] sketching, not talking to anybody, discussing anything with anybody.” (Tr. at 175.) According to Mr. Khayat, he called the Complainant into his office and asked her what she was doing. According to him, she said, “I am sketching the plant, drawing.” (*Id.*) He told her to wait to do that until she got a new computer. He then asked her to go to the laboratory and “see what we have in there of obsolete material, of material that does not belong in there anymore, not labeled material.” (Tr. at 175-176.) He asked her to put things in boxes in the quarantine area until they could determine what to do with them. He explained that Meta Labs receives many samples from vendors.

Mr. Khayat stated that he had another conversation with the Complainant about her sketch, JX 7. He could not recall the exact date, but said he could not understand what the sketch was intended to depict. He told her to take it to the artist who could put it into a more understandable format. He testified that he never saw the sketch again. (Tr. at 176.) He explained that his facility has loading docks, which were not visible on the Complainant’s sketch. (Tr. at 183-184.) He explained that if he implemented the Complainant’s layout, he would not be able to

receive or ship anything because objects would be stacked up in the front of the garage doors and “would be against the Fire Marshal regulation...” (Tr. at 184.)

Mr. Khayat testified that JX 1 was a copy of Mr. Neri’s work, not the Complainant’s as she previously testified.³ He opined that it was “not [the Complainant’s] work, because if you look at all this lettering and the QCC, these are all Mr. Neri’s footprint. So what she did is she took what he did, and copied and pasted.” (Tr. at 179.) He explained that Mr. Neri’s “footprint” was Mr. Neri’s way of speaking in too many letters and codes. (*Id.*) Mr. Khayat testified that there was already an existing standard operating procedure in existence on March 10, 2014. (Tr. at 231.)

Regarding JX 2, Mr. Khayat testified that it was the Complainant’s response to his inquiry into what she was working on. (Tr. at 180.)⁴ He stated that he “asked her to go into the manufactur[ing] operation and observe what we are doing, and report what we are doing, and tell me her opinion whether we are doing it right or wrong, or what adjustment we need to make.” (*Id.*) He testified that he did not want her to just copy Mr. Neri’s procedure book, as that is what caused him “trouble with FDA in January, 2014.” (*Id.*) Mr. Khayat testified that the first time he saw JX 6 was at his attorney’s office. (Tr. at 182.) He stated, “I’ve seen all these things before, because they are from procedure that we had that Mr. Neri laid out.” (Tr. at 183.)

When questioned whether the Complainant expressed any concerns to him about safety or regulatory noncompliance during her first week at Meta Labs, Mr. Khayat responded, “She did say she thought we are noncompliant [sic] with certain things. But specific things, no.” (Tr. at 178.) Similarly, when asked whether the Complainant expressed concerns about Meta Labs’ compliance and/or safety during her second week on the job, Mr. Khayat stated, “Not that I recall, no.” He testified that if she had valid concern, “she should have done that in writing” either by sending an e-mail or an urgent report. (Tr. at 185.)

Mr. Khayat testified that the first time he saw CX 1, the Complainant’s notes, was on the first day of the hearing. (Tr. at 185.) He also stated that JX 8, the memo highlighting the Complainant’s work, “never existed before she left” Meta Labs. (Tr. at 227-228.)

Alleged Violations

Mr. Khayat stated that he tried to have meetings with the Complainant to discuss what she was doing. (Tr. at 177.) When asked whether he recalled the Complainant alerting him to safety or regulatory concerns, he stated, “No. But at the same time, that’s why she was hired, to correct whatever problems that we have.” (Tr. at 185.) When asked whether the Complainant

³³ The Complainant testified that she created the format for JX 1, which was a “one of the SOP” (standard operating procedures) that she “put together in compliance with FDA,” to “have a QC and QA system set up to comply with this lotion here.” (Tr. at 39.) She testified that she thought this system would “more likely have good audit from FDA.” (*Id.*) She stated she started drafting JX 1 around March 17. (Tr. at 151.)

⁴ The Complainant testified that JX 2 was an e-mail she sent to Mr. Khayat to let him know that she was “review[ing] SA, and approv[ing] current written SOP documentation as appropriate ongoing.” (Tr. at 43.) She agreed that the first page of JX 2 was the same as the first page of JX 6. (Tr. at 53.) She stated JX 6 was her proposal for a new format for the SOP. (Tr. at 54.)

alerted him to the existence of expired chemical ingredients in the lab, he responded, “I already knew about those. I’m the one who sent her there to clean them out.” (Tr. at 186.)

Mr. Khayat did not recall the Complainant telling him about her concern regarding access to the safety data sheets, but he stated that they were available in the laboratory, manufacturing laboratory, and the computer server, and noted that when OSHA inspected Meta Labs, it “didn’t see any problem with that.” (Tr. at 186.) When asked about whether the Complainant alerted him to her concerns about chemical storage, Mr. Khayat stated, “We do not have hazardous material.” (*Id.*) He stated that his facility has never had sulfuric acid. (*Id.*) He explained that the only hazardous materials at Meta Labs are sodium hydroxide and alcohol. (*Id.*) According to Mr. Khayat, sodium hydroxide “comes in the pallet format, and is stored in container inside [a] sealed box, and it is powder.” He explained it takes a long time to hydrate and “you have to do something to it for it to react.” (*Id.*) He stated that alcohol is used “in cleansing and disinfecting our dietary supplement mixer.” (*Id.*)

According to Mr. Khayat, the Complainant never alerted him to her concerns about the way in which chemicals were being stored in Meta Labs’ facility. (Tr. at 187.) He agreed she told him that she was concerned about menthol being poured down sinks, but explained “there was no menthol that poured down the sink” because “menthol is crystal,” a solid, and it cannot be put down the sink because it would clog the sink. (*Id.*) He explained that the smell is the ointment, which has menthol “camphor” in it, and when the tanks are cleaned, they contain residue that puts off a menthol odor. (*Id.*) He testified that menthol is “[a]bsolutely not” a toxic substance.” (Tr. at 188.) On cross-examination, he explained that he got approval from the city, who knows “exactly” what Meta Labs was doing to dispose of menthol. (Tr. at 223.)

When asked whether the Complainant discussed her concerns about ventilation, Mr. Khayat stated that she had not and explained that Meta Labs had proper ventilation. (Tr. at 189.)

When questioned whether the Complainant raised her concerns regarding individuals in the lab who were not wearing safety shoes, Mr. Khayat stated, “She mentioned about wearing steel-toe boots. Our operation does not require steel-toe boots. Our operation only requires that you wear toe-cover[ed] shoes. In other words, you can[not] wear sandals and flip-flops,” which he testified nobody wore. (*Id.*)

Similarly, Mr. Khayat stated that the Complainant did not alert him to her concern about workers not wearing safety glasses or about the fact that there was no guard in front of moving machinery or equipment. (Tr. at 190.) When asked about her concern that workers were not wearing hard hats, he stated, “She mentioned about hard hats. And I explained to her that number one, we don’t have forklifts, or we don’t have heavy pallets stacked up high. The highest shelf we have is over 12 feet high, and we go on a ladder that is [an] OSHA approved ladder. And there are no heavy material[s] on those shelves. And I told her no, it is not required for that area.” (*Id.*) Furthermore, he stated that she did not alert him to her concern that Meta Labs was not complying with 21 C.F.R. Part 111. (*Id.*)

Regarding calibration, Mr. Khayat explained that sometimes things are out of calibration and then need to be corrected. (Tr. at 217.) He stated, “The one that we use in manufacturing,

they are calibrated. She is probably talking about something in the lab.” (*Id.*) He explained that Meta Labs calibrates its own instruments. (Tr. at 225.) Contrary to the Complainant’s testimony, Mr. Khayat stated that Meta Labs does have standard weights. (*Id.*)

Termination

Mr. Khayat testified that he terminated the Complainant’s employment after receiving her last e-mail on March 20, 2014. He explained, “When I saw the work that she did, and I was thinking, ‘I’m spending \$65,000.00 for this? I don’t think so.’” (Tr. at 191-192.) He described his frustrations as follows:

Q: What exhibit number?

A: Exhibit 2.

Q: Okay.

A: When she said, “I have been helping with the following current project.”

Q: Why was that a concern to you?

A: Number one, helping who? There was nobody to help. It was her job to do, to take care of this, number one. Number two, she said review, study and approve written SOP doc[us], as appropriate[,] ongoing. That was not what I asked her to do.

I asked her to go to the plant and observe the operation and see if everybody is doing—following the proper procedure, because I did not want her to go and take Mr. Neri’s procedures and copy them and follow them because they were not correct to start with, anyhow.

Number three, when she said ongoing, what does that mean? Ongoing? What have you done? What is that you have done? What is it that you saw? What is it that you’re suggesting? None of these thing happen[ed]. It was so open-ended, that of course, when we started the first week with the fact that she didn’t want to work on the computer because it was too slow, and then the second week, after she got her computer, I don’t see anything, but these things on there, something was too fishy. That’s why I decide[d] I need[ed] to cut my losses short at that time.

(Tr. at 193.) Mr. Khayat reiterated that he had previously employed someone for a year who he felt did not do his job, and did not want to repeat that experience. He stated that if the Complainant knew about dietary supplements she should have been familiar with the Code of Federal Regulations, which he began to question. (Tr. at 194.)

When asked whether the Complainant’s concerns or observations about Meta Labs’ regulatory compliance or safety factored into his decision to terminate her employment, Mr. Khayat responded, “Absolutely not.....[L]ike I said, I didn’t need her to come and tell me these

things. That's what I hired her to do." (Tr. at 195.) He reiterated that he told her directly to observe, take notes, and tell him what needed to be fixed. (Tr. at 196.) He testified that he told her to put her notes in writing, as he asked everybody to do since he was busy. (Tr. at 197.)

On cross-examination, Mr. Khayat reiterated that he fired the Complainant because she misrepresented her qualifications, did not follow instructions, and, in his opinion, falsified her resume. (Tr. at 204-205, 209.) He stated, "I did not terminate her because she said we are out of compliance. That's not even true. That was not even the discussion. If she said we are out, we are not in compliance or we are out of compliance, we knew that. I didn't need her to tell me that." (Tr. at 216.) He further explained that her behavior and work in the two weeks she was on the job "showed absolutely no knowledge of the dietary supplement regulations." (Tr. at 205.) He stated that he felt that someone who worked in the industry as long as the Complainant should have known "everything like the back of your hand." (*Id.*) He opined, "She should know the procedures, not the code, the procedures that are required to process dietary supplements." (Tr. at 207.) He acknowledged that the regulations were extensive, and but added that while they tell the reader not to do, they "don't give you the step of how to do things, really." (Tr. at 248.) He stated that the Complainant's entire work product for the two weeks she worked at Meta Labs consisted of notes (CX 1) and a drawing that was not legible to him. (JX 7.) He stated that she never proposed a solution. (Tr. at 205-206, 220.)

When questioned by the undersigned, Mr. Khayat stated, "Yes, sir" when asked whether he told the Complainant that he did not want her to review the written standard operating procedures that were in place because "they were not set up for dietary supplements." (Tr. at 241.) He further testified that he "explained to her those SOPs were not designed for [Meta Labs'] operation, so she does not need to clutter her mind with that." (Tr. at 242.) Mr. Khayat explained that he thought he had four meetings with the Complainant in two weeks, and every time he met with her, he gave her instructions on what he wanted her to do. (Tr. at 243.) Regarding the Complainant's termination, Mr. Khayat testified as follows:

We had conversations in the second week about her not performing the job. I explained to her that, "You are not doing what I asked you to do. I need you to go in there and do what I asked you to do." And all she did is she sat down there and argued with me, "I don't have this, I don't have that," always about what she did not have.

(Tr. at 245-246.) He testified he told his wife to get the Complainant whatever she needed. (Tr. at 246.)

Mr. Khayat stated that he had to settle disagreements between Ms. Hunt and the Complainant, as "Ms. Hunt felt Ms. Farley was not doing the job that she was hired to do." (*Id.*) He testified that he consulted with Ms. Hunt, Mrs. Khayat, and some other employees prior to terminating the Complainant. (Tr. at 249.) According to Mr. Khayat, employees told him that the Complainant "just walked around with a pad in her hand, and she's scratching on it. And that is it. Nothing happened. She didn't intermingle with the employees. She asked somebody about couple things, and I think that was about that menthol smell. But that was it." (Tr. at 250.)

Moreover, he stated that Ms. Hunt reported that the Complainant just “sits there” and “does nothing.” (*Id.*) He asked Mrs. Khayat to explore what was going on and talk to others, and he stated it was “the same story” and the Complainant was “always just doing nothing.” (*Id.*) When asked whether anyone expressed the view that the Complainant was making them do things to become FDA-compliant that they did not want to do,” Mr. Khayat responded, “No, sir.”

Subsequent OSHA Investigation

Mr. Khayat testified that he met with an OSHA inspector in August 2014, during an unannounced inspection. (Tr. at 198.) After the inspection, he stated that the inspector, Ms. Griffin, told him “everything was fine” before discussing her specific findings. First, she found that Meta Labs had PVC pipes running over the air compressor, and cautioned against an explosion. (Tr. at 200.) Mr. Khayat stated that no prior OSHA inspector had ever mentioned the problem. He agreed to change the pipes to copper. Second, he stated that Meta Labs did not have a “respiration protection program” in place when mixing or encapsulating dietary supplement. He further stated, “And she was right with that. But my thinking was if Ms. Farley was that knowledgeable of policy, why didn’t she see these things? Why didn’t she bring them up to my attention when she was working?” (*Id.*)

According to Mr. Khayat, the inspector did not raise concerns about hard hats, safety glasses, the eyewash station, shoes, or chemical storage. (Tr. at 200-201.) She did tell him that he needed to run a wire from the drum for grounding purposes, and he agreed to do so. (Tr. at 201.) On cross-examination, Mr. Khayat explained that when the OSHA inspector inspected Meta Labs, she “did not see any of those things” that the Complainant complained about. (Tr. at 219.)

Mr. Khayat testified that since the August 2014 OSHA inspection and the January 2014 FDA inspection, he has not had any other inspections from OSHA or the FDA. (Tr. at 201.) Moreover, he stated that Meta Labs is not under a consent decree from any federal or state agency, and nobody has shut down Meta Labs for noncompliance. (Tr. at 201-202.)

Rosa Khayat’s Hearing Testimony (Tr. at 252)

Rosa Khayat testified at the hearing on January 29, 2016. She stated she was employed as the vice president of Meta Labs in March 2014. (Tr. at 253.) She stated that she interacted with the Complainant “[a] little.” (*Id.*) She testified that the Complainant had a working computer, which was connected to the network, on her first day of work. (Tr. at 253-254.) Mrs. Khayat testified that the Complainant was not satisfied with her chair or computer and “insisted” on getting a “high-speed computer.” (Tr. at 254.)

Mrs. Khayat stated that she terminated the Complainant, even though it was Mr. Khayat’s decision to do so. (Tr. at 255.) Mrs. Khayat testified that she completed the Complainant’s separation notice, but Mr. Khayat provided the reason for the termination. (Tr. at 256.) When asked whether she had “an understanding on what basis that decision was made,” Mrs. Khayat responded, “Yes, sir, because she was not doing her job. We hired her to FDA stuff, and she wasn’t doing that.” (*Id.*) Mrs. Khayat testified that the Complainant never talked to her about Meta Labs following FDA regulations. (Tr. at 260.) When asked by the undersigned whether her

husband said anything specifically to her about why he was firing the Complainant, she replied, “Just that she wasn’t working on the FDA like we hired her to do, and she wouldn’t follow instructions.” (Tr. at 261.)

APPLICABLE LAW

In 2011, Congress amended the Food, Drug, and Cosmetic Act, 21 U.S.C § 1021, through passage of the Food Safety and Modernization Act, a bill designed to comprehensively reform food safety laws. *See* Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified as amended at 21 U.S.C. § 301, *et seq.*). Section 1012 of the Food, Drug, and Cosmetic Act provides protection for an employee from retaliation because the employee has engaged in protected activity pertaining to a violation or alleged violation of the Food, Drug, and Cosmetic Act or any order, rule, regulation, standard, or ban under the Food, Drug, and Cosmetic Act. The provision of the Food Safety and Modernization Act relevant to this case provides 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 Act [21 USCS §§ 301 et seq.] or any order, rule, regulation, standard, or ban under this Act [21 USCS §§ 301 et seq.], or any order, rule, regulation, standard, or ban under this Act [21 USCS §§ 301 et seq.];

(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 Act [21 USCS §§ 301 et seq.], or any order, rule, regulation, standard, or ban under this Act [21 USCS §§ 301 et seq.].

21 U.S.C. § 399d(a).

I. APPLICABILITY OF THE ACT

The parties stipulated that the Act applies to this case, the Respondent meets the definition of an Employer under the Act, and the Complainant meets the definition of an employee under the Act. (Tr. at 17.) Therefore, I find that this case falls under the jurisdiction of the Act.

II. PROTECTED ACTIVITY

The Complainant testified that she witnessed multiple safety violations, including those involving the following: (1) expired chemicals (Tr. at 22); (2) recordkeeping (Tr. at 23); (3) instrument testing (Tr. at 26); (4) in-process testing and calibration (Tr. at 26-27); (5) safety data sheets (Tr. at 33); (6) the quarantine area (Tr. at 34-35); (7) waste disposal, specifically the disposal of menthol (Tr. at 35); (8) improper ventilation (Tr. at 36); (9) safety shoes, safety glasses, and hard hats (Tr. at 36-37); and the fact that the Respondent did not have a guard in front of moving machinery or equipment (Tr. at 37, 190).

The Complainant testified that she made a corrective action plan “[b]y handwritten work” and was then terminated.” (Tr. at 32.) She was referring to CX 1, her notes relating to the FDA regulations. She stated, “I think when I give them all the handwritten notes about the concern and the corrective action, that the plan should immediately correct the action to comply with the agency, the government agency. When they get all that, and then, all the sudden I am fired.” (Tr. at 47.)

According to the Complainant, she gave Ms. Hunt a copy of CX 1 on March 17 or 18. (Tr. at 49-50.) Furthermore, when asked whether she gave written notice to Mr. Khayat or anyone else at the company about her concerns about expired chemical ingredients in the laboratory, the Complainant responded, “I sure did” and then said, “Well, that, it’s my note,” referencing CX 1. (Tr. at 118.) In direct opposition to the Complainant’s testimony, however, Mr. Khayat testified that the first time he saw CX 1 was on the first day of the hearing. (Tr. at 185.) In other words, according to Mr. Khayat, CX 1 consists of notes prepared for hearing which were not given to him during the Complainant’s employment.

After observing her demeanor and statements while testifying, and comparing them to the demeanor and testimony of Mr. and Mrs. Khayat, I find no reason to accept the Complainant’s testimony over that of the Respondent’s witnesses. Even assuming, *arguendo*, that Mr. Khayat, who is the individual who made the decision to terminate the Complainant, saw and read CX 1 before he made the decision, nothing in CX 1 reports the perceived violations that the Complainant claims that she raised with the Respondent. When examined, CX 1 appears to nothing more than a handwritten listing of the various subsections of 21 C.F.R. Part 111 without anything further regarding the application of those subsections to the Respondent’s facility. The Complainant admitted as much. On cross-examination, when asked, “And nowhere in C-1 do you expressly state that there are expired chemical ingredients in the lab, do you?” the Complainant responded, “On this here, no.” (Tr. at 120-121.) When asked further, “And nowhere

in C-1 do you expressly state your concern about expired chemical ingredients in the lab and production area?" she responded, "No." (Tr. at 121.)⁵

The Complainant also sent various e-mails to Mr. Khayat. However, in them she did not discuss any of the alleged violations that she discussed at the hearing. She agreed that her e-mail dated March 19, 2014 did not raise her concern regarding expired chemical ingredients in the laboratory and production area. (Tr. at 119.) She further testified that her e-mail dated March 20, 2014 did not raise a concern about expired chemical ingredients in the laboratory. Finally, she agreed that her second e-mail dated March 20, 2014 did not raise a concern about expired chemical ingredients. (Tr. at 119-120.) Thus, I find that the Complainant did not report any of the perceived violations through any of the e-mails of record.

When asked whether the record contained "one writing, one picture, one voice mail expressing" her "serious concerns about public safety and employee safety for the entire duration of [her] employment with" the Respondent, the Complainant said she made a handwritten note "on the diagram," "c[a]me up with plan A, B, C," and "gave it to" Mr. Khayat. (Tr. at 124-125.)

The diagram to which Complainant referred, and through which she stated that she voiced her safety concerns, was labeled the "New and Improved Scheme for Production Area." The Complainant testified that JX 7 was a "plan" she came up with and showed to Mr. Khayat. (Tr. at 56.) She explained that Plan A, as diagramed in JX 7, assures a clear walkway, creates organized storage, and details how chemicals and equipment should be stored. (Tr. at 57-58.) She further explained that in Section B, she came up with a "new, improve[d] quarantine area section," a "laboratory area," and a "lab stability testing room." (Tr. at 58-60.) She explained that "[w]ithin a few days" she came "up with a plan to have the corrective action, you know, immediately." (Tr. at 59.) When asked whether she presented her plan to the Respondent, she said she gave it to Mr. Khayat, and he introduced her to an artist who could help her come up with the plan. (Tr. at 61-62.) Regarding Section C, the Complainant testified that she thought the Respondent needed to make corrective action "because chemical odor can kill you." (Tr. at 144.)

Initially, it should be noted that JX 7 does not purport to be the original sketch drawn up by the Complainant. On cross-examination, the Complainant agreed that JX 7 was not her original hand drawing. (Tr. at 132-133.) When asked whether she presented her plan to the Respondent, she said she gave it to Mr. Khayat, and he introduced her to an artist who could help her come up with the plan. (Tr. at 61-62.) Mr. Khayat testified that when the Complainant turned "in the so-called solution, it was that chicken scratch on a small pad that was not legible." (Tr. 219.) He stated that he sent the Complainant to get him "a legible format" so they two could discuss it; however, he stated that a legible version "[n]ever showed up." (Tr. 219-220.) He added: "This, this exhibit that you told me about which is [Joint] Exhibit 7, I never saw it before till I saw it at my lawyer's office." (Tr. 219-220.) Asked by the undersigned if the bullet points in

⁵ According to the Complainant, JX 8 contains her notes documenting everyone she worked with at Meta Labs. (Tr. at 63.) When questioned by the undersigned regarding the document, the Complainant testified that she created it after she was fired. (Tr. at 147.) Describing JX 8, she stated that she "wrote down [her] opinion [of] what happened, what [was] going on... to see myself what I did wrong over there." This document appears, therefore, to have been prepared subsequent to her employment.

JX 7 were in the original drawing, he stated, “They were not.” (Tr. 251.) The Complainant, however, testified that the bullet points were in the original. (Tr. 145.)

Mr. Khayat further denied that he had ever asked the Complainant remedial plans for the offices. (Tr. 244.) As noted, he explained that his facility has loading docks, which were not visible on the Complainant’s sketch. (Tr. at 183-184.) Thus, when he did view JX7, he testified that he considered the changes to the layout of his facilities impracticable because they would block the loading docks. (Tr. at 184.)

Weighing the testimony regarding JX 7, I find that there is no strong evidence that Mr. Khayat ever viewed anything but the original sketch drawn up by the Complainant, which he agrees was presented to him, but which he considered largely illegible. The original, it should be noted, is not in evidence. The Complainant and Mr. Khayat gave directly conflicting testimony as to whether the bullet points on JX 7 were in the original. I cannot say that I find the Complainant more credible on this issue than Mr. Khayat. In any case, what part of JX7 was actually seen by Mr. Khayat, if any, before the decision to terminate the Complainant, is difficult, if not impossible, to determine, as I have no basis to disbelieve Mr. Khayat that he never saw JX7 until it was produced in litigation. It is clear that he saw the original, and directed the Complainant to make a better copy with the help of a co-worker, but after that the provenance of what turned out to be JX 7 is less than clear.

Finally, the Complainant argues that she orally conveyed her concerns to Mr. and Mrs. Khayat and Samantha Hunt in meetings. (Tr. at 114.) She testified that “[m]ore likely at the time” her complaints were verbal, and qualified that by saying “I don’t have any written.” (Tr. at 114.)

At this point, it should be noted that the Complainant’s answers to questions were rather difficult to understand at times. Often, she would treat questions as an opportunity to espouse her views, sometimes at length, rather than answer directly. Many times, she had to be admonished to confine her answer to the question put to her. Without appearing to be intentionally evasive, she nonetheless was hard to pin down on facts. Because of this, the provenance of certain exhibits and the precise timing and nature of conversations was never made entirely clear from her testimony. At times, her answers were confounding and resistant to clarification. The undersigned attempted to sift through her testimony regarding the origin of exhibits and the dates of any conversations. (*See, e.g.*, Tr. at 146-148, 150-151.) Ultimately, she appeared to agree that the majority of her complaints were verbal. (Tr. at 149, 150, 152.) The upshot of these conversations was equally vague. When asked how the Respondent responded to her verbal complaints, she stated, “I didn’t understand what they’re thinking at the time. I just voice my concern. I didn’t hear no response.” (Tr. at 115.) The Complainant testified that “every time” she had a meeting, she “let them know that we are failed to meet comply with FDA, or where we have order by OSHA, we can meet OSHA or EPA.” (Tr. at 128.)

It is noted that a safety complaint need not be written, as an oral complaint suffices under the regulations. However, although the Complainant repeatedly testified that she raised her concerns with Mr. and Mrs. Khayat and Samantha Hunt, she could not discuss in detail a single conversation she had with them. She generally alleged that the Respondent was out of

compliance with the regulations, but this would not necessarily have constituted any new information, as she acknowledged that the very reason that the Respondent hired her was “to lift the company in compliance with the operation, in operation in manufacturing at that site.” (Tr. at 20.) Mr. Khayat repeatedly testified that he hired the Complainant after the FDA’s inspection revealed that Meta Labs was not complying with every aspect of the regulations. (Tr. at 170, 239.) When questioned whether the Complainant expressed any specific concerns to him about safety or regulatory noncompliance during her first week at Meta Labs, Mr. Khayat responded, “She did say she thought we are incompliant [sic] with certain things. But specific things, no.” (Tr. at 178.) Similarly, when asked whether the Complainant expressed concerns about Meta Labs’ compliance and/or safety during her second week on the job, Mr. Khayat stated, “Not that I recall, no.” Furthermore, when asked whether he recalled the Complainant alerting him to safety or regulatory concerns, he stated, “No. But at the same time, that’s why she was hired, to correct whatever problems that we have.” (Tr. at 185.)

In the same vein, Mr. Khayat did not recall the Complainant reporting to him any concerns regarding access to the safety data sheets, chemical storage, ventilation, safety glasses, or lack of a guard. (Tr. at 186, 189, 190.) He agreed she told him she was concerned about menthol being poured down sinks. He clarified, though, that “there was no menthol that [was] poured down the sink” because “menthol is crystal,” a solid, and therefore could not be poured down the sink without clogging it. (*Id.*) Mr. Khayat explained that the only hazardous materials at Meta Labs were sodium hydroxide and alcohol. (Tr. at 186.)

Mr. Khayat did confirm that the Complainant expressed concern about employees not wearing safety shoes, although he added, “Our operation does not require steel-toe boots. Our operation only requires that you wear toe-cover[ed] shoes. In other words, you cannot wear sandals and flip-flops.”(Tr. at 189.) He agreed the Complainant talked to him about her concern that workers were not wearing hard hats, although again he stated that he felt that the concern was misplaced. “I explained to her that number one, we don’t have forklifts, or we don’t have heavy pallets stacked up high. The highest shelf we have is over 12 feet high, and we go on a ladder that is OSHA approved ladder. And there are no heavy material on those shelves. And I told her no, it is not required for that area.” (Tr. at 190.) Finally, when asked whether the Complainant alerted him the existence of expired chemical ingredients in the lab, he responded, “I already knew about those. I’m the one who sent her there to clean them out.” (Tr. at 186.)

I find, therefore, that the only strong evidence that the Complainant relayed any specific safety concerns to Mr. Khayat were in conversations that she may have had regarding the pouring of menthol down the sink, and the wearing of safety shoes and hard hats. Otherwise, her testimony regarding verbal conversations and complaints about safety issues was presented in such a oblique manner that it is difficult to find with any certainty what conversations occurred and when.

Still, there is no doubt that the Complainant did raise some safety concerns during her two weeks with the Respondent. As Mr. Khayat repeatedly pointed out, this is why he hired her. It would have been her job to do so. On some level, therefore, although it is difficult to discern exactly what, she engaged in protected activity.

2. Respondent Was Aware of the Complainant's Protected Behavior

The Complainant must next demonstrate that the Respondent was aware of his protected activities, such that they contributed to his termination. The fact that the Respondent was aware of the conversations which both parties agreed took place—*i.e.*, those concerning chemicals or ingredients poured down the sink, hard hats, footwear, expired chemicals—cannot be seriously argued since they both agreed the conversations took place.

3. Complainant Suffered an Unfavorable Personnel Action

The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. *See Burlington Indus., Inc. v. Ellen/i*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). It is clear from the testimony and record that the Complainant suffered adverse employment action when he terminated from her employment.

4. Complainant's Protected Behavior was Not a Contributing Factor in the Unfavorable Personnel Action

As the Complainant has established the first three elements of a *prima facie* claim of retaliation under the FRSA, the Complainant must next show that her protected behavior was a contributing factor in his termination.

The regulations implementing the Act provide that, “A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1987.109(a). 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.” *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). If the Complainant satisfies her burden, the burden shifts to the Respondent to demonstrate “by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1987.109(b).

A complainant can sustain his or her burden through either direct or indirect evidence. *Sievers v. Alaska Airlines, Inc.*, ARE No. 05-109, AU No. 2004-AIR-028 (ARB Jan. 30, 2008). Direct evidence is evidence that conclusively links the protected activity and the adverse action. *Id.* at 4-5. The Administrative Review Board (“ARB”) has described direct evidence as “smoking gun” evidence that “conclusively links the protected activity and the adverse action and does not rely on inference.” *Williams v. Domino's Pizza*, ARE No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). Alternatively, the complainant may rely upon circumstantial evidence. For example, the complainant may show that the respondent's proffered reason for termination was not the true reason, but instead “pretext.” *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-OI 1, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her protected activity contributed to the termination. (*Id.*) According to the ARB, “If the complainant proves pretext, [the fact finder] may infer that his protected activity contributed to his termination, although [the fact finder is] not compelled to do so.” *Domino's Pizza, supra*, slip

op. at 6. In evaluating the merits of the circumstantial evidence, courts may take into consideration the following factors: 1) timing of the unfavorable personnel action in relation to the protected activity; 2) disparate treatment of the complainant; 3) deviation from routine procedures; 4) attitude of supervisors towards the whistleblower and protected activity in general⁶; and 5) the complainant's work performance rating before and after engaging in protected activity. *Sievers v. Alaska Airlines, Inc.*, ARE No. 05-109, AU No. 2004-AIR-028 (ARB Jan. 30, 2008).

Finally, it should be noted that the ARB has recently considered whether the respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant's causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014.) A split panel of the ARB ruled, *inter alia*, that an administrative law judge may not weigh a respondent's evidence of a legitimate, non-retaliatory reason for an adverse action when determining whether the complainant has met his or her burden of proving contributing factor causation by a preponderance of the evidence.⁷

Considering first the Complainant's testimony alone, it contains no "smoking gun" evidence" that conclusively links her termination to her protected activity. There are no statements alleged to Mr. Khayat that would link his decision to fire her for her protected activity. Indeed, throughout his testimony, he stressed that he had hired the Complainant for the express purpose of helping him bring Meta Labs into FDA compliance. As he persuasively argued, therefore, it would be odd and curiously self-defeating if he retaliated against the Complainant for doing the job he had agreed to pay her \$65,000 per year to perform. As the trier-of-fact who observed Mr. Khayat's demeanor at the hearing, I detected no retaliatory animus from him toward the Complainant as a result the safety concerns she raised simply because they were safety concerns. I did detect, however, enormous frustration from him toward the Complainant arising from their inability to get on the same page regarding what was expected of her during her first two weeks of employment. If Mr. Khayat demonstrated any ulterior mindset, it was wariness, after his experience with Mr. Neri, that he had hired another quality-control expert whose background was ill-suited to his needs.

Given the fact that she only lasted at Meta Labs for a couple of weeks, however, and did engage in protected activity at some level, the one factor that does militate in favor of a prima facie case is temporal proximity. As noted, temporal proximity between the protected activity and the adverse job action can constitute circumstantial evidence of causation. If *Fordham* is applied and only the Complainant's evidence is viewed in isolation, arguably the Complainant has sustained her burden of establishing a prima facie case based upon the timing of her

⁶ Proof of *animus* towards protected activity may be sufficient to demonstrate discriminatory motive. See *Sievers, supra*, slip op. at 27. "[R]idicule, open hostile actions or threatening statements," may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996).

⁷ More recently, in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the ARB affirmed, but clarified, the *Fordham* decision. On May 23, 2016, the ARB vacated its en banc decision in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Mar. 20, 2015) (en banc), reissued with full dissent (ARB Apr. 21, 2015). *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB May 23, 2016) (en banc).

termination. However, whether factored into the analysis as part of the determination whether a prima face case has been established, or upon rebuttal, I find that the Respondent persuasively demonstrated at the hearing that the reason it chose to terminate the Complainant was ultimately related to job performance and not her protected activity.

III. THE RESPONDENT HAS SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE TERMINATED THE COMPLAINANT DESPITE HER PROTECTED ACTIVITY

Even assuming *arguendo* that the Complainant engaged in protected activity and her protected activity contributed to the Respondent's decision to terminate her, the Respondent has demonstrated "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." 29 C.F.R. § 1987.109(b).

Mr. Khayat testified at length regarding his reason for hiring the Complainant. He explained that the FDA inspected Meta Labs twice, first in 2012. (Tr. at 166.) After the first inspection, where the FDA noted some deficiencies, Mr. Khayat hired an expert in FDA regulations. (Tr. at 166-167, 173.) In 2014, the FDA inspected Meta Labs again, and, through the inspection, Mr. Khayat discovered that the person he had hired to ensure Meta Labs' compliance with the FDA, Mr. Neri, had not set up procedures for a dietary supplement company. (Tr. at 168.) Following the FDA's second inspection, Mr. Khayat discharged Mr. Neri because "he did not do his job that he was hired to do." (*Id.*)

In response to the FDA's second inspection, Mr. Khayat hired the Complainant. He stated that during her interview, they "talked about her knowledge of dietary supplement, FDA regulation and GNP requirements." (Tr. at 170.) He alleged she "said that she knew all those things, she's an expert in all these things." (Tr. at 170, 239.) When asked whether he told her about the FDA's prior visits to Meta Labs, he stated he did so during the interview, and further stated, "Yes, that's why I hired her, I told her. I explained to her the reason she is being hired, because I had a consultant before her that did not do the job because the FDA has cited us for not complying with certain things." (*Id.*) When questioned by the undersigned, Mr. Khayat stated, "I told her that we had warning letter from the FDA, and we had issue[s] with regulations, and I needed her to go in there and correct the problems, see what the problems, and get us into compliance." (Tr. at 240.) Mr. Khayat explained that when the Complainant began working at Meta Labs, he asked her to look at how the company operates and tell him what needed to be corrected in order to come into compliance with the FDA. (Tr. at 172.)

Significantly, the record shows that Mr. Khayat interviewed the Complainant for only one-half hour, and did not contact any references, before offering her the job. (Tr. at 240.) He testified, though, that he considered the Complainant's initial period of employment to be a probationary period (Tr. at 228-229) and he did not contract to employ her for any particular length of time. (Tr. at 240.)

Unfortunately, the employment got off to a rocky start. Both Mr. and Mrs. Khayat testified that the Complainant made demands on her first day on the job. Mr. Khayat stated that the Complainant complained about her computer, even though her office contained a "functional" computer that was "used by the previous chemist." (Tr. at 204.) Similarly, Mrs.

Khayat testified that the Complainant had a working computer, which was connected to the network, on her first day of work. (Tr. at 253-254.) Mrs. Khayat testified that the Complainant was not satisfied with her chair or computer, and “insisted” on getting a “high-speed computer.” (Tr. at 254.) After the Complainant complained about her computer, Mr. Khayat asked her to “go into the plant,” “observe the operation,” and “note what” she saw and what Meta Labs needed “to correct” until he could find a computer that she wanted.

Moreover, Mr. Khayat testified at length that the Complainant did not follow instructions. He stated that other employees told him that the Complainant was “walking around [the plant] sketching, not talking to anybody, discussing anything with anybody.” (Tr. at 175.) He stated that he called her into her office and asked her what she was doing. According to him, she replied, “I am sketching the plant, drawing.” (*Id.*) He then asked her to go to the laboratory and “see what we have in there of obsolete material, of material that does not belong in there anymore, not labeled material.” (Tr. at 175-176.) He asked her to put things in boxes in the quarantine area until they could determine what to do with them.

Mr. Khayat stated that he tried to have meetings with the Complainant to discuss what she was doing. (Tr. at 177.) He said that he had a conversation with her in her second week on the job, told her that she was not doing her job, and asked her to “go in there and do what I asked you to do.” (Tr. at 245-246.)

Mr. Khayat stressed that he was frustrated by what he considered the Complainant’s inability to grasp what he wanted from her in terms of work product. He testified that he wanted the Complainant to do more than cite regulations in the abstract, but, rather, to suggest specific solutions to specific problems. As stated by Mr. Khayat, “...I would have no problem, if she came to me and she said, ‘Here’s the things that are wrong, and here’s how we need to solve it.’ None of that has happened.” (Tr. 212.)

Furthermore, Mr. Khayat testified that he asked for solutions from the Complainant to be set forth in writing for later consultation. (Tr. at 244.) Mr. Khayat testified:

Ms. Farley had the habit of rambling on sometimes, and it’s hard to keep track of what she’s saying. So lot of times, I try to concentrate. But when you are busy, in a hurry, and you cannot stop to hear something about something that would take take five seconds. And the thing about it is if she thought anything was a concern, she should have done that in writing. She should have sent an e-mail or she should have sent an urgent report or something to say, “Hey, I have a problem here.”

(Tr. 185.) He stated that the first week he expected the Complainant to “go and observe, write notes and see, come back to me, report back to me what she saw that is correct, what she saw that is incorrect, and what she saw that we need to fix.” (Tr. at 196.) He stated that he requested that she report “every day on what’s going on,” and that it was his policy to tell everybody to send him information by email or in writing. (Tr. at 197.)

The only thing he received in writing, Mr. Khayat stated, was the original draft of the Complainant's sketch to redesign the facility, which he described as a "chicken scratch." (Tr. at 176.) As stated by Mr. Khayat, "The only solution she came in with is that drawing that she scratched on a piece of paper that I could not understand." (Tr. 206.) He stated that he had not asked the Complainant for any such remedial redesign of the facility. (Tr. 244.) Moreover, even in its final form (JX 7), which he claimed not to have seen until the hearing, Mr. Khayat rejected the proposed redesign as utterly impracticable, as it would require that the loading docks be blocked. (Tr. at 184-184.) He rejected the Complainant's review of the SOPs, because he claimed that he wanted her to at first go into the laboratory to investigate for noncompliant practices (Tr. at 243, 247), and, secondly, he stated that the emails he received from her regarding the SOPs appeared to be no more than a rehash of Mr. Neri's already discredited work product. (Tr. at 178-179.) All these things, Mr. Khayat testified, created a growing apprehension that his second attempt at hiring a quality-control expert was proving no more successful than his first attempt. (Tr. at 193.) He testified that he began to suspect that the Complainant failed to grasp the scale of Respondent's operation and its particular needs. (Tr. at 188.) Moreover, because the Complainant was not providing him with succinct solutions to specific problems, he began to question whether she possessed the expertise which he seems to have taken at face value when deciding to hire her. (Tr. at 211.)

Regarding terminating the Complainant, Mr. Khayat testified that he made the decision after receiving her last e-mail on March 20, 2014. He explained that her e-mail demonstrated that she was not doing the job he had asked her to do. (Tr. at 191-192.) He had asked her to observe the operation in the plant, not "take Mr. Neri's procedures and copy them and follow them because they were not correct to start with, anyhow." (Tr. at 193.) Mr. Khayat explained his previous experience with Mr. Neri, who did not do the job he was hired to do, and he felt that he "had to be careful" and ensure that the Complainant was who she said she was. (Tr. at 194.)

Mr. Khayat explained that he fired the Complainant because he had concluded that she misrepresented her qualifications, and further because she did not follow instructions. (Tr. at 204-205, 209.) He stated, "I did not terminate her because she said we are out of compliance. That's not even true. That was not even the discussion. If she said we are out, we are not in compliance or we are out of compliance, we knew that. I didn't need her to tell me that." (Tr. at 216.) He explained that her behavior and work in the two weeks she was there "showed absolutely no knowledge of the dietary supplement regulations." (Tr. at 205.) He opined, "She should know the procedures, not the code, the procedures that are required to process dietary supplements." (Tr. at 194, 207.) He stated her work product consisted of notes (CX 1) and a drawing that was not legible to him (JX 7). (Tr. at 205-206, 220.)

Mr. Khayat explained that he did not make the decision to terminate the Complainant unilaterally. He stated that he consulted with Samantha Hunt, Mrs. Khayat, and some other employees prior to terminating the Complainant. (Tr. at 249.) Employees told him that the Complainant "just walked around with a pad in her hand, and she's scratching on it. And that is it. Nothing happened. She didn't intermingle with the employees. She asked somebody about couple [of] things, and I think that was about that menthol smell. But that was it." (Tr. at 250.) Moreover, he stated that Ms. Hunt reported that the Complainant just "sits there" and "does

nothing.” (Tr. at 250.) He asked Mrs. Khayat to explore what was going on and talk to others, and he stated it was “the same story” and the Complainant was “always just doing nothing.” (*Id.*)

Mrs. Khayat’s testimony was consistent with that of Mr. Khayat. When asked whether she understood the basis for the Complainant’s termination, Mrs. Khayat responded, “Yes, sir, because she was not doing her job. We hired her to FDA stuff, and she wasn’t doing that.” (Tr. at 255.) When asked by the undersigned whether her husband said anything specifically to her about why he was firing the Complainant, she replied, “Just that she wasn’t working on the FDA like we hired her to do, and she wouldn’t follow instructions.” (Tr. at 261.)

Based on the evidence of record, and the testimony of Mr. and Mrs. Khayat, both of whom I find to be credible, I find that the Respondent has shown by clear and convincing evidence that it would have terminated the Complainant regardless of whether she engaged in protected activity. As the trier-of-fact, it was evident from the hearing that the Mr. Khayat was sincerely interested in making sure that Meta Labs was in FDA compliance, which was the reason why he hired the Complainant. Nonetheless, the employment relationship deteriorated quickly, indeed, almost from the start with issues regarding the functionality of the computer she was given to work with. Clearly, the Complainant and Mr. Khayat were never able to get on the same page regarding what she was to do with her time—what work product was expected of her. Because of this failure, Mr. Khayat’s confidence in the Complainant’s abilities eroded precipitously, due in large part to his experience with her predecessor, particularly when she continued to fail to do the work he asked, which was to present written solutions to specific problems consistent with her purported expertise in such matters.

Although another employer may have stayed with the Complainant longer, and given her more time to adjust to the facility, Mr. Khayat gave a reasonable and believable explanation of why he felt the need to terminate her quickly, given his prior experience with Mr. Neri. Although the undersigned found the Complainant very sincere in her passion for product safety, she also proved to be a difficult witness at times, refusing to confine her answers to the questions presented. This proclivity lent credibility to Mr. Khayat’s testimony that he found it difficult to communicate with her because she gave rambling answers that were difficult to understand, thus underscoring the need for her to put things in writing, which it does not appear that she ever did in an acceptable fashion. Indeed, much of the dysfunction in the employment relationship appears to have stemmed from a profound failure of communication.

I find significant, also, the point raised by Mr. Khayat, that after the Complainant terminated the Respondent faced another FDA inspection and came out relatively unscathed. Whatever remedial action the Respondent was required to take appeared minor compared to the dire state of the Respondent’s facility according to the Complainant’s assessment. As Mr. Khayat pointed out, the purpose of his hiring the Complainant was to assist the Respondent in passing FDA inspection, and in this regard the two items that the Respondent was required to remediate were not even among those that the Complainant had raised during her employment. The outcome of the FDA’s latest inspection lends credence to Mr. Khayat’s concerns that the Complainant did not understand the purpose of her hire, but chose to focus instead on other matters which the subsequent FDA inspection did not validate.

For all these reasons, I find that even assuming, *arguendo*, that the Complainant made out a prima facie case that her protected activity contributed to her termination based on temporal proximity, the Respondent has established by clear and convincing evidence that it would have fired her regardless of her protected activity, for legitimate non-retaliatory reasons having to do with work performance, inability to follow directions, and problems with communication. Furthermore, if the Respondent's evidence is considered along with the Complainant's to determine whether a prima facie case was established, *see Powers, supra*, then the Respondent's evidence is sufficient to overcome any inference based on temporal proximity and precludes a finding that the Complainant even established a prima facie case that her protected activity contributed to her termination.

CONCLUSION

Although the Complainant established that she engaged in protected activity and suffered an adverse job action, there is no direct evidence that her protected activity contributed to her termination. Only by viewing the Complainant's evidence in isolation can the conclusion be drawn from temporal proximity that her protected activity contributed to the decision to terminate her employment. However, when considered, the Respondent's evidence clearly and convincingly demonstrated that there was no retaliatory animus in the decision to terminate her, and that the Respondent would have terminated the Complainant regardless due to her failure to perform her duties as expected and as instructed.

ORDER

Based on the foregoing, having failed to establish the requisite elements of entitlement necessary to obtain relief under the FDA's whistleblower-protection provisions, **IT IS HEREBY ORDERED** that Lan Farley's claim is **DENIED**.

JOHN P. SELLERS, III
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the

submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

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

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

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