



Issue Date: 17 October 2016

Case No.: 2015-FDA-00006

In the Matter of:

HELEN ROLDAN

Complainant

v.

P.S.K. SUPERMARKETS, INC.

Respondent

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This matter arises from a claim of retaliatory employment action under section 2012 of the Food, Drug, and Cosmetic Act ("FDCA"), added by section 402 of the FDA Food Safety and Modernization Act ("FSMA"), Pub. L. 111-353, and codified at 21 U.S.C. § 399d.

I. STATEMENT OF THE CASE

Helen Roldan ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on May 28, 2014.¹ She alleged that PSK Supermarkets, Inc. ("Respondent") terminated her employment in retaliation for refusing to alter the expiration date on pre-packaged poultry. After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator, dismissed the complaint by letter dated June 2, 2015. OSHA found that Respondent terminated Complainant for performance issues and abandoning her job and would have terminated her even if she had not engaged in protected activity.

On July 1, 2015, Complainant requested a hearing before a Department of Labor ("DOL") Administrative Law Judge ("ALJ"). An Initial Prehearing Order and Notice of Hearing was issued on July 9, 2015. Subsequently, the parties filed three joint motions for a continuance, which were granted. On April 21, 2016, Respondent filed a Motion for Summary Decision. Along with its Motion, Respondent submitted the following documents: declaration of Respondent's Attorney, Heather R. Boshak, ("Boshak Decl.") with Exhibits A through P ("EX

¹ OSHA's June 2, 2015 letter to Complainant states that Complainant filed her complaint on May 28, 2014. See Respondent's Exhibit N submitted with Heather R. Boshak's declaration. The record does not include a copy of this complaint.

1A-1P”), declaration of Respondent’s Vice-President of Operations, Edward Hunt, (“Hunt Decl.”) with Exhibits A through BB (“EX 2A-2BB”), and declarations of Evelyn Vaquer (“E. Vaquer Decl.”), William Vaquer (“W. Vaquer Decl.”), and Rafael Lopez (“Lopez Decl.”). Complainant did not file a response and the time to file a response has passed.

The following findings and conclusions are based on a complete review of the record in light of the parties’ arguments, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent.

II. ISSUE

Has Complainant raised a genuine issue of material fact regarding any essential element of her claim, making summary decision inappropriate?

III. PARTIES’ CONTENTIONS

In her OSHA complaint, Complainant alleged that she was terminated from her employment in retaliation for refusing to alter the expiration date on pre-packed poultry. *See* EX 1N.

Respondent alleges that it terminated Complainant for job abandonment. *See* Respondent’s Brief at 1. In support of its Summary Decision Motion, Respondent asserts the following: 1) Complainant had no reasonable belief she was engaged in protected activity; 2) there was no adverse action because Complainant abandoned her job with no intent of returning; 3) Complainant’s alleged protected activity, refusing to date chicken past its expiration, is unrelated to her termination; and 4) even presuming Complainant has established that her protected activity is related to her termination, Respondent would have terminated her employment regardless of her protected activity because she refused to attend work. *Id.* at 2.

IV. SUMMARY OF EVIDENCE INCLUDED WITH RESPONDENT’S MOTION FOR SUMMARY DECISION

With its Motion for Summary Decision, Respondent submitted 44 exhibits and 3 declarations. While not all are discussed below, those exhibits and declarations have been carefully considered in reaching this decision.

Summary of Exhibits

Respondent company operates supermarkets throughout New York City. *See* Hunt Decl. at ¶ 3. Complainant worked as a meat wrapper for Respondent from September 2004 to May 10, 2014. *Id.* at ¶ 4; EX 1A at 87. Complainant trained for her position at Respondent’s store located on Hillside Avenue in Hollis, New York (“Hillside Ave. Store”). *See* Hunt Decl. at ¶ 5; EX 1A at 124. After her training, Complainant worked at a store in Bedford-Stuyvesant (“Bedstuy Store”). *See* Hunt Decl. at ¶ 5; EX 1A at 125. In January 2005, Respondent transferred Complainant from the Bedstuy Store to a store on Gerard Avenue (“Gerard Ave. Store”) in the Bronx because Complainant had conflicts with the Bedstuy Store Meat Manager,

William Vaquer (“W. Vaquer”). *See* Hunt Decl. at 6; EX 1A at 233. Complainant subsequently worked at the Gerard Ave. Store for three years, until January 2008, when she was transferred to a store on 204th Street in the Bronx (“204 Store”) because another meat wrapper left. *See* Hunt Decl. at ¶ 7. Due to a fire at the 204 Store, Complainant was transferred to the Hillside Ave. Store. *See* Hunt Decl. at ¶ 8; EX 1A at 140-141. At the Hillside Ave. Store, Complainant developed a conflict with the meat manager Ray Torres (“Torres”). *See* Hunt Decl. at ¶ 9; EX 1A at 144. The Union and Respondent determined that Complainant and Torres cannot work together. EX 1A at 143. Consequently, when the 204 Store was rebuilt, Torres was sent back to the 204 Store and Complainant remained at the Hillside Ave. Store. *Id.*

At the Hillside Ave. Store, Complainant developed conflicts with the meat manager, Joey Cristino (“Cristino”) and his wife, meat wrapper and shop steward Nancy Zarcone (“Zarcone”). EX 1A at 160-161. Due to these conflicts, Complainant requested to transfer away from the Hillside Ave. Store. *Id.* at 200-201. Respondent transferred Complainant to the Bedstuy Store. *Id.* at 201; Hunt Decl. at ¶ 14. At the Bedstuy Store, Complainant was disciplined for refusing to clean. EX 1A at 276-279. Complainant was also disciplined for videotaping a coworker. *Id.* at 330-331; Hunt Decl. at ¶ 23. Complainant video-recorded W. Vaquer, the meat department manager, when she saw him put boxes of Perdue chicken on the floor. *Id.* At the Bedstuy store, Complainant also had ongoing problems with E. Vaquer, a meat wrapper and Bedstuy Store shop steward. EX 1A at 292-306. The Bedstuy Store Manager, Jorge Chacon (“Chacon”), had a meeting with Complainant and E. Vaquer, informing them that they would be suspended if the fighting continues. *Id.* at 307.

On Thursday, April 24, 2014, W. Vaquer directed Complainant to scale a box of chicken going on sale, which entailed weighing the chicken and placing a new sticker with a new date. EX 1A at 350; Hunt Decl. at ¶ 26-31. W. Vaquer removed the stickers from the chicken packages and had the packages brought up from the basement refrigerator to the meat department for scaling. *See* Hunt Decl. at ¶ 26; EX 1A at 30; EX 2P. Complainant refused to scale the chicken, stating that she did not know the sell-by date. EX 2P; EX 1A at 354. Consequently, W. Vaquer directed E. Vaquer to scale the chicken. EX 1A at 357; EX 2P. Complainant took out her phone and began recording.² *Id.* E. Vaquer left the store and filed a police report against Complainant. EX 1A at 399; EX 2Q. Complainant was sent home that day. EX 1A at 393.

Respondent decided that Complainant should be transferred to a store on McDonald Avenue in Brooklyn (“McDonald Store”). EX 1A at 401; EX 2P. Complainant was to report to the McDonald Store on Saturday, April 27, and Sunday, April 28, and then work at the Bedstuy Store for a week to cover E. Vaquer’s shift. EX 1A at 413-415; EX 2P. Complainant was then to report to the McDonald Store permanently. EX 2P. Complainant did not report to the McDonald Store on Saturday or Sunday. EX 1A at 413; EX 2P. She called the McDonald Store and informed an employee that she will not be coming in. *Id.* Complainant worked at the Bedstuy Store for the entirety of the following week. *Id.* The following week, Complainant did not report to the McDonald Store or any day thereafter.³ EX 1A at 417, 425.

² The subject of Complainant’s video is at issue. Complainant alleges that she was recording the boxes of chicken while Respondent alleges that Complainant was recording E. Vaquer.

³ Complainant was supposed to start working at the McDonald Store on May 4, 2014. EX 1A at 417.

The Union told Complainant that she could be fired if she did not report to the McDonald Store. EX 1A at 419-420; EX 2P. The Union, through Peter Iacono (“Iacono”), sent Complainant a letter informing her that if she did not report to work, Respondent can consider that job abandonment and terminate her employment. *Id.* at 420-421; EX 1G. Respondent terminated Complainant’s employment on May 10, 2014.⁴ EX 1A at 87; EX 2T.

Exhibit 1A: Complainant’s Deposition

Complainant testified at a deposition on February 24 and March 16, 2016. Transcript (“T”). She testified that on April 24, 2014, while Complainant was working, a person named “Jason” came in with a pallet of meat and told Complainant that W. Vaquer directed her to add nine days to the meat. T. 30, 37-38. Jason told her to be careful because the meat was expired and that W. Vaquer removed all the stickers in the basement.⁵ T. 30, 38. Complainant’s co-workers, Rafael Lopez and E. Vaquer, were in the room and according to Complainant, Rafael Lopez witnessed her receive the expired meat. T. 28. After Complainant received the instructions, she went outside and told W. Vaquer that the box has no date on it. T. 39. W. Vaquer told her to forget about the date and to add nine days. T. 39. Complainant then called the Union to tell them about the expired chicken. T. 42. Peter Iacono, a Union official, told Complainant not to change the date because doing so is illegal and she could be fired for it. T. 42. Complainant said that she never had a meeting with Edward Hunt, Vice President of Operations, regarding this incident. T. 42.

Complainant testified that ever since she started working at the store, W. Vaquer and E. Vaquer would tell her to change the date on the chicken. T. 114-115. She explained that employees had to erase the expiration date on the yellow sticker using acetone and place a new sticker with a longer expiration date. T. 110. Complainant would look at the date of the new order and place the new expiration date on the old order. T. 115. She estimated that employees did this about three times a week. T. 112. Complainant said that sometimes she had to erase the date and sometimes the box came without the date. T. 106. When inspectors would come by every few months, all the employees would hide the acetone. T. 266.

Complainant said that she reported the activity to the Union who would tell her not to alter the date and she would follow the Union’s instructions. T. 117-118. She said that every time she was suspended, it was because she refused to change the dates; she maintained she was suspended about six to ten times for refusing to erase the dates. T. 118. However, the suspension reports state that she was suspended for not cleaning or cooperating. T. 120. Complainant confirmed that her employment with Respondent ended on May 10th and she has not worked anywhere else since. T. 87.

Complainant summarized her tenure with Respondent, stating that she worked at different stores and explained each of her transfers. T. 124-165. Complainant was finally transferred to the Bedstuy Store. T. 167. She began having problems at the Bedstuy Store when she would

⁴ Although Complainant testified that Respondent terminated her employment before May 10, 2014, Complainant also conceded in her deposition that she was terminated as of May 10.

⁵ Complainant later said that she knew that everything was expired because she looked at the dates. T. 299.

refuse to change the date on the meat. T. 202. Around 2013, Complainant started reporting the activity to the Union, started refusing to change the dates, and would be suspended for not “cleaning.” T. 204-205. After Complainant complained to a Union representative, W. Vaquer and E. Vaquer became hostile towards her and started sending Complainant to clean, so that Complainant would be outside and not see them changing the dates. T. 211-212.

Complainant testified at a deposition on March 16, 2016. She testified that she was transferred out of the Bedstuy Store the first time because she was not getting along with W. Vaquer. T. 233-234. Complainant confirmed that she has been sent home for refusing to do work, specifically refusing to clean. T. 261. Complainant refused to clean because she did not like that she was sent to clean all the time and she became allergic to the chemicals. T. 269-279.

Complainant stated that she developed problems with E. Vaquer because E. Vaquer would refuse to alter meat expiration dates and so Complainant would be sent to do that job. T. 292-293. Complainant would report this issue to W. Vaquer, who would not address it. T. 295. Complainant also had arguments with E. Vaquer because E. Vaquer would not do her work. T. 298. Complainant described several arguments that she had with E. Vaquer. T. 306. Chacon had a meeting with E. Vaquer and Complainant, telling them that if they continued to argue, they would both be suspended. T. 307.

In May 2013, Complainant was disciplined for filming W. Vaquer. T. 330. Complainant recorded a video of W. Vaquer putting Perdue chicken boxes on the floor and sent it to the Union. T. 331. Subsequently, Liz Fontanez from the Union called W. Vaquer and told him to not put merchandise on the floor. T. 332. According to Complainant, W. Vaquer told her not to film employees but neither the Union nor Chacon told her that she could not videotape. T. 332-334.

At the March 2016 deposition, Complainant again testified regarding the April 24, 2014 events. T. 348. She said that W. Vaquer came in with a palette of chicken and told Complainant to add ten days to the expiration date. T. 349-350. Rafael was also in the room. T. 350. Complainant explained that she had to scale the chicken and then place a sticker on the chicken with the new date. T. 350. Complainant opened the box of chicken and told W. Vaquer “it doesn’t have a date” and W. Vaquer responded “just give it ten days.” T. 353. Complainant then took one of the packets out and checked for the date. T. 354. However, Complainant did not see any dates on the side of the package and she told W. Vaquer again “it doesn’t have a date.” T. 354. W. Vaquer again responded “give it ten days.” T. 354. Complainant told W. Vaquer that the Union warned her about putting expired products for sale. T. 354.

Complainant said that she knew that the chicken was expired because she has “been dealing with that chicken the whole week...so they were already—I think they had expired, like, a day ago.” T. 355. She said she also knew that the chicken was expired because all the stickers were removed and the guy that brought the merchandise told Complainant that the chicken is expired and that W. Vaquer removed the stickers downstairs. T. 355. Complainant elaborated that both W. Vaquer and the “other guy” brought the chicken upstairs. T. 356. After she told W. Vaquer that the Union forbade her from changing dates, W. Vaquer directed E. Vaquer to do the work because Complainant had already called the Union. T. 357. E. Vaquer came over, stating

that Complainant could not prove that the chicken was expired. T. 357. Complainant then took out her phone and recorded the boxes. T. 357. W. Vaquer left and said he was going to call the Union. T. 365. Complainant decided to record to have evidence for the Union when they arrive. T. 365-366. Complainant stated that she was filming the boxes, not E. Vaquer. T. 367.

During the deposition, Complainant watched the video that she recorded on that day. T. 378. She explained what she said in the video: “they removed the stickers and they did it downstairs,” “you could see all the stickers there that’s removed,” “the shop steward, as always, she’s defending the company,” and “there she is. She’s protesting.” T. 378-380. E. Vaquer moved away from the boxes because she saw that Complainant was filming, and according to Complainant, E. Vaquer didn’t want Complainant filming her because she was putting on stickers. T. 381. Raphael stated in the video: “don’t do that Helen. You’re going to get yourself in trouble.” T. 381.

Employer’s counsel pointed out three boxes that had stickers in the video. Complainant explained that those were not the boxes that she was working on. T. 385. Complainant was sent home that day. T. 393. She asked for a writing memorializing why she was sent home. T. 393. Complainant said that they didn’t write what really happened, instead the writing states that she was sent home for recording. T. 393. Complainant said that she was sent home because she was filming the boxes. T. 394.

Employer’s counsel gave Complainant the employee warning notice she received the day of the incident. T. 396. She said that “Frankie” called her via intercom into his office and told her that she was suspended for making a video. T. 397. Complainant told Frankie that she made the video “because of the meat.” T. 398. E. Vaquer called the police on that day and a police officer came into the store. T. 398. Complainant said that she does not know why E. Vaquer called the police. T. 398. Complainant confirmed that E. Vaquer filed a harassment charge against her. T. 399.

The next day, Liz Fontanez (“Fontanez”) called Complainant on the phone and told Complainant that she was being transferred to the McDonald store. T. 401. Fontanez told Complainant that E. Vaquer got a restraining order against Complainant and so she could not go back to the store. T. 401. Complainant told Fontanez that she did not have any argument with E. Vaquer and that the problem was with the boxes. T. 412. Complainant said that she did not have a meeting the next day with Fontanez, Iacono, E. Vaquer, and Hunt. T. 402. The next day, Complainant went to the precinct to report the police officer who took down her personal information the day before. T. 403. Two police officers accompanied Complainant to the store. T. 405. After the two police officers left, Hunt, Fontanez, and Iacono were present and asked Complainant why she brought police officers and Complainant told them about the police officer the day before. T. 405. Hunt, Fontanez, and Iacono asked Complainant to show them the video, which she did. T. 405-406. Complainant said that Ed Hunt never spoke to her about company policy regarding expired meat or videotaping. T. 409-410.

Complainant was told to report to the McDonald Store on that Saturday and Sunday and then to cover E. Vaquer’s shift the following week at the Bedstuy Store. T. 413-415. Complainant called the McDonald Store and told them that she could not go because it was very

far away. T. 413. The McDonald Store told her to call the Union. T. 414. Complainant did not work that weekend but she did go to the Bedstuy Store to cover E. Vaquer's shift during the week. T. 415. Hunt asked Complainant why she did not come in that week and she told him that it was very far away for her. T. 415. Complainant said that she would call in the Union, reporting on all of the occasions that she was supposed to report to the McDonald Store but neither Iacono nor Fontanez responded. T. 472. Complainant confirmed she worked at the McDonald store a long time ago. T. 413.

Complainant denied having a meeting on April 25, 2014. T. 417. Fontanez told Complainant on the phone that she will be permanently transferred to the McDonald Store. T. 418. Complainant told Fontanez that she "was not going to play that game with them anymore." T. 418-419. Fontanez replied that if Complainant did not report to the McDonald Store then the company would fire her. T. 419. Complainant said she will wait for the Union's defense. T. 419. Employer's counsel showed Complainant a letter from Iacono informing her that if she does not report to work, the company may consider that as job abandonment and take disciplinary action including termination. T. 420-421. Complainant said that when Employer sent her this letter, she believed she was already fired because Ed Hunt sent her a letter stating that she was. T. 422.

Complainant filed a complaint with OSHA by calling and speaking with Ruben Lopez. T. 432. Complainant told Ruben Lopez that she was terminated because she refused to alter the dates on the meat packages. T. 433-435. She acknowledged that she was suspended and not terminated the day of the incident. T. 435. Complainant acknowledged that she was terminated after she refused to report to the McDonald Store. T. 437.

Exhibit 1C: Letter from Roldan to UFCW Local 342 dated February 3, 2014

Complainant wrote a letter to the Union, co-signed by four other co-workers. The letter stated that the workers are dissatisfied with management and the fact that the meat department manager, W. Vaquer, and the shop steward, E. Vaquer, are brother and sister.

Exhibit 1E: DVD of video taken by Complainant on April 24, 2014

Respondent submitted a 30 second video. The video shows several cardboard boxes with ripped off stickers. In one of the boxes, there are packages of chicken drumsticks. Complainant is speaking in Spanish as she is making the video. After showing the contents of one of the boxes, the video pans to a woman who is walking away from the camera.

Exhibit 1F: April 24, 2014 Employee Warning Notice

Complainant was sent home for taking pictures and recording E. Vaquer while working. She received a warning for violating company policy. Employer's witness was Franklin Pinto.

Exhibit 1G: May 9, 2014 Letter from Peter Iacono to Complainant

Peter Iacono, Union Representative, wrote a letter to Complainant, stating that “as discussed with you regarding your refusal to report to work at Foodtown PSK #6... this letter will memorialize that you have been advised by me that your failure or refusal to report to work may be considered job abandonment by your employer and risk the employer taking disciplinary action against you or even termination.”

Exhibit 1H: Letter from Roldan to Iacono dated May 12, 2014

Complainant responded to Iacono’s letter. She wrote that she has no intention of abandoning her employment. She explained that traveling to the new store would be an even greater hardship than her previous commute. Complainant wrote that she has been dealing with a hostile work environment, verbal harassment, and intimidations for the last three years.

Exhibit 1I: Whistleblower Application

On November 3, 2014, Complainant filed a FSMA complaint with OSHA alleging that she was terminated from her employment because she refused to alter the expiration dates on the packaged meat sold in the supermarket.

Exhibit 1J: Ruben Lopez’s DOL OSHA Memo—“Initial Interview with Helen Roldan”

Investigator Ruben Lopez wrote a memo on November 25, 2014 summarizing his interview with Complainant. Complainant reported that her supervisor instructed her to alter the expiration dates on pre-packaged chicken. Mr. Lopez also summarized Complainant’s grievances regarding her multiple transfers and desire to work at the Bronx store. Mr. Lopez wrote that Complainant refused to accept her transfer and the Union sent Complainant a letter stating that if she did not show up to work, she would be terminated. Complainant reported that since day one of working at the last location, she was told to alter the expiration dates on pre-packaged meat. She believed that altering the expiration dates was a violation of meat safety rules. Complainant also reported having personal issues with her supervisor and the shop steward on a daily basis.

Exhibit 1N: OSHA letter to Complainant

On June 2, 2015, OSHA wrote a letter to Complainant informing her that they did not find any FSMA violation. Complainant alleged that she was terminated in retaliation for refusing to alter expiration dates on meat. Respondent alleged that it terminated Complainant because Complainant had performance issues and because she abandoned her job. After conducting an investigation, OSHA found that Respondent terminated Complainant for performance issues and abandoning her job and that Respondent would have terminated Complainant even if she engaged in a protected activity.

Edward Hunt's Declaration

Edward Hunt, Respondent's Vice President of Operations, wrote a declaration. He wrote that Complainant was hired to work at the Bedstuy Store and initially worked at the Bedstuy store after her training at the Hillside Store. Complainant was subsequently transferred several times for different reasons. Hunt listed the exhibits included with his declaration. He wrote that he held a meeting with the Union, E. Vaquer, and Complainant following the April 24, 2014 incident. At the April 25, 2014 meeting, the Union and Hunt agreed that Complainant should be transferred to the McDonald Store because Complainant and E. Vaquer could not work together. E. Vaquer could not be transferred to a different store because she was the Union shop steward and had more seniority pursuant to the collective bargaining agreement ("CBA"). Pursuant to the CBA, E. Vaquer could not be transferred without her permission.

Hunt said that there was no discussion of imposing discipline on Complainant at the April 25, 2014 meeting. Hunt explained that Respondent was limited in selecting a new location for Complainant. Complainant could not work at the Bedstuy or Hillside stores due to conflicts with personnel. She could not work at the Bronx stores because those stores had more senior meat wrappers in place. The McDonald Store was chosen because it was only four miles from the Bedstuy Store.

Mr. Hunt said that at the April 25, 2014 meeting, Complainant never mentioned any person named Jason nor did she allege that Jason told her that the chicken was expired. Complainant also did not make any allegation that W. Vaquer or anyone else ever instructed her to alter meat expiration dates, erase meat expiration dates, or date meat past its expiration date. Hunt wrote that the McDonald Store is approximately four miles from the Bedstuy Store and Complainant has previously worked at the McDonald Store to cover vacations without complaint.

Exhibit 2A: Collective Bargaining Agreement (CBA) and Article XXI - Transfers

This CBA article covers employee transfers from one store to another; Section J states that full time permanent employee transfers from a store "shall be made on the basis of company seniority."

Exhibit 2J: Hunt's May 7, 2013 Memo

Hunt wrote a memo memorializing a meeting between Employer, the Union, and Complainant on May 7, 2013. The meeting was regarding an incident in which Complainant left early without authorization. In this meeting, E. Vaquer also mentioned that Complainant cursed at her at one point. Mr. Hunt included the following notation at the end of his memo: "this issue with Helen is ongoing and is starting to become disruptive to store operations."

Exhibit 2K: Hunt's Phone Call Memo

Hunt wrote a memo memorializing a phone call he had with Union Business Agent, Liz Fontanez, and Bedstuy Store Manager, Jorge Chacon, on May 13, 2013. During this phone call,

the parties discussed Complainant's conduct. Complainant alleged that W. Vaquer slammed cases on the floor near her and she had to open each case to pack out. Complainant then began recording a video on her phone of the people in the store. W. Vaquer called Hunt, and Hunt told Chacon to direct Complainant to stop taking videos and get back to work. E. Vaquer also called Hunt, stating that she was upset that Complainant was taking videos of employees. Hunt called Fontanez and told her that Complainant cannot videotape people in the store. He said that if it happens again Respondent will take stronger action. Fontanez agreed.

Exhibit 2O: Edward Hunt's March 14, 2014 letter to the Union

Hunt wrote a letter to the Union on March 14, 2014, explaining to them why Respondent cannot transfer Complainant to the Bronx. Hunt explained that there is a fulltime meat wrapper at each of the Bronx stores. Each store requires only one fulltime meat wrapper. Hunt wrote that under the CBA, Complainant does not have seniority to work at those stores.

Exhibit 2P: Edward Hunt's April 25, 2014 Meeting Memo

Hunt wrote a memo memorializing a meeting he had with the Union, E. Vaquer, and Complainant regarding the April 24, 2014 incident. According to W. Vaquer, he told Complainant to scale chicken at a sale price. Complainant refused to scale the chicken because there were no stickers on the packages. W. Vaquer told Complainant to use the dates that had been on the packages before (4/29/2014). Complainant refused because she did not know the dates and did not know why W. Vaquer pulled the stickers off of the packages. W. Vaquer explained that the meat is not outdated but the price is being changed to the sale price. Complainant called the Union. W. Vaquer then told E. Vaquer to scale the meat. Complainant pulled out her phone and started recording E. Vaquer scaling the meat. E. Vaquer told her to stop but Complainant continued to record until one of the butchers told Complainant to stop. E. Vaquer called the police and filed a harassment complaint. Complainant was sent home for the day for videotaping another employee. Hunt noted that Complainant was aware that such behavior was against company policy.

At this meeting, E. Vaquer and Complainant voiced their problems with each other. Complainant told her understanding of the events. She said she refused to scale the chicken because the meat was expired. In response to the question of how did Complainant know that the meat was expired, Complainant said that she knew that they were.

The Union and Hunt spoke with W. Vaquer separately. W. Vaquer said that he pulled the stickers off of the meat because it would be quicker to scale. W. Vaquer said "I told her to scale the meat with the proper date that had been on the sticker and [Complainant] refuses and stops the whole meat department by carrying on, that is why I told Evelyn to do it and [Complainant] started to videotape Evelyn." The parties then spoke to Complainant. Complainant said that she was videotaping the chicken and not E. Vaquer. Iacono, Fontanez, and Hunt watched the video and they all found that she videotaped E. Vaquer.

Hunt explained to Complainant and E. Vaquer that they cannot work together. Hunt told Iacono that Complainant will be transferred to the McDonald Ave store for Saturday, April 26,

and Sunday, April 27. Complainant would then return to the Bedstuy Store on Monday to cover E. Vaquer's vacation. After E. Vaquer's vacation, Complainant would work at the McDonald Store and E. Vaquer would stay at the Bedstuy Store.

Hunt wrote a follow up note. He wrote that Complainant did not report to work on Saturday, 4/26/14 or Sunday, 4/27/14. Complainant called the McDonald Store on Sunday and spoke to the butcher, telling him that she will not report to the store. Complainant reported to the Bedstuy Store on Monday. Hunt went to the Bedstuy Store and asked Complainant why she did not go to the McDonald Store on Saturday and Sunday. She said it was too far and she was not going to go there after this week. Complainant said she had no intention of going to the McDonald Store. Hunt told her that she had to report to the store. Complainant called the Union who told her that she has to report to the McDonald Store or she could lose her job.

Exhibit 2Q: NYC Police Department Incident Information Slip

E. Vaquer filed a police report on April 24, 2014 for "harassment" at the Bedstuy Store.

Exhibit 2S: Mapquest directions

Hunt printed Mapquest directions on April 28, 2014 showing the distance between the McDonald Store and Bedstuy Store and Complainant's residence. According to the Mapquest directions, Complainant's residence is 22.58 miles from the McDonald Store and 17.32 miles from the Bedstuy Store. Based on this distance, the Mapquest website estimates that it would take about 26 minutes to travel from Complainant's residence to the Bedstuy Store and about 38 minutes to travel from Complainant's residence to the McDonald Store.

Exhibit 2T: Hunt's Termination Letter to Complainant

Hunt wrote a letter dated May 15, 2014. It is addressed "to whom it may concern" and states that Complainant "has been terminated as of May 10, 2014." The letter was sent to Complainant and Local 342 UFCW.

Evelyn Vaquer's Declaration

E. Vaquer wrote a declaration dated April 20, 2016. She wrote that she did not witness any interaction between Complainant and Jason on April 24, 2014. During her employment with Respondent, she never altered, or been instructed to alter, meat expiration/sell-by dates. She has never instructed anyone to alter meat expiration/sell-by dates nor has she ever witnessed any employee or manager alter meat expiration/sell-by dates.

William Vaquer's Declaration

W. Vaquer wrote a declaration dated April 18, 2016. He wrote that he has never altered, or been instructed to alter, meat expiration/sell-by dates. He has never instructed anyone to alter meat expiration/sell-by dates nor has he ever witnessed any employee alter meat expiration/sell-by dates.

Rafael Lopez Declaration

Rafael Lopez wrote a declaration dated April 19, 2016. He wrote that he did not witness any interaction between Complainant and Jason on April 24, 2014. During his employment with Employer, he has never altered or been instructed to alter meat expiration/sell-by dates. He has never instructed anyone to alter meat expiration/sell-by dates nor has he ever witnessed any employee or manager alter meat expiration/sell-by dates.

V. PRINCIPLES OF LAW

a. The FSMA

The FSMA amended provisions of the FDCA. The FSMA adopted a new whistleblower protection provision that contained procedural and remedial protections for whistleblowers in the food industry. The relevant provisions of the FSMA provide that

In general No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—

- (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any order, rule, regulation, standard, or ban under this chapter, or any order, rule, regulation, standard, or ban under this chapter; [1]
- (2) testified or is about to testify in a proceeding concerning such violation;
- (3) assisted or participated or is about to assist or participate in such a proceeding; or
- (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter, or any order, rule, regulation, standard, or ban under this chapter.

21 U.S.C. § 399d(a).

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

As with other “contributing factor” statutes, a contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, slip. op. at 11, 29 (ARB March 20, 2015); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 689-91 (7th Cir. 2009) (discussing *Marano* as applied to analogous whistleblower provision in the ERA); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)). A contributing factor may be proven by “direct evidence or indirectly by circumstantial evidence.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. 6—7 (ARB Feb. 29, 2012).

b. Summary Decision Standard of Review

Summary decision is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. §18.72. The movant bears the burden to show the absence of a genuine issue of material fact and all justifiable inferences are drawn in favor of the non-moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

In determining if summary decision is appropriate, all reasonable inferences must be drawn in favor of the non-moving party, credibility determinations may not be made and evidence may not be weighed. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on its pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324; 29 C.F.R. § 18.72.

In responding to a motion for summary decision, the non-moving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his or her favor. *See* 29 C.F.R. § 18.72 (c). The Administrative Review Board (“ARB” or “Board”) has held that “if the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact.” *Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). A non-moving party cannot defeat a summary decision

motion without presenting “significant probative evidence” to support its complaint. *See Anderson*, 477 U.S. at 249.

When the information submitted for consideration with a motion for summary decision and the reply to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted.⁶ Where a genuine question of a material fact remains, a motion for summary decision must be denied.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a covered employer and Complainant is a covered employee under the FSMA

The parties do not address whether they are covered under the FSMA. A covered employer under the FSMA is an “entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 21 U.S.C. § 399d(a). Respondent is a company that operates food supermarkets in New York City. *See Hunt Decl.* at ¶ 3. Accordingly, Respondent is a covered entity under the Act as it is engaged in, *inter alia*, the reception and distribution of food. The record also establishes, and the parties agree, that Complainant was an employee of Respondent during all relevant times of this complaint. Thus, Respondent is a covered employer and Complainant is a covered employee under the FSMA.

Complainant has not raised a genuine issue of material fact regarding any essential element of her claim, making summary decision inappropriate

When the evidence is viewed in the light most favorable to Complainant, she has failed to demonstrate the existence of the essential alleged element, that Complainant’s engagement in a protected activity was a contributing factor in an adverse action taken against her. As Respondent contested several elements of Complainant’s complaint, this decision will address each factor under 21 U.S.C. § 399d(a).⁷

1. Was Complainant’s engagement in a protected activity a contributing factor in an adverse employment action taken against her?

a. Did Complainant engage in protected activity under the FSMA?

The alleged protected activity in this case is refusal to alter the sell-by date on pre-packaged poultry. Respondent has not argued that the activity itself, the refusal to change sell-by dates, is not a protected activity. Instead, Respondent argued that Complainant did not engage in a protected activity because she did not have a reasonable belief that the objectionable action violates the FDCA. *See Respondent’s Brief at 27.* Respondent cited to *Sylvester v. Parexel Int’l*

⁶ Here, Complainant did not submit a reply to Respondent’s Notice of Motion as allowed. Nonetheless, consideration has been given to Complainant’s deposition testimony included with Respondent’s Motion for Summary Decision.

⁷ Respondent does not dispute that it knew of Complainant’s alleged protected activity. Thus, this factor is not addressed below. Furthermore, the evidence shows that Respondent was aware that Complainant refused to scale the meat because she believed the meat was expired. *See EX 2P.*

LLC, 2011 WL 2165854, at *11-12 (ARB May 25, 2011) for the proposition that a complainant must have both a subjective good faith belief and an objectively reasonable belief that the conduct violated the Act. *Id.*

Respondent argued that Complainant did not have a reasonable belief that Respondent asked her to change the expiration dates because: 1) some of the boxes in the video did have stickers; 2) removing and replacing price tags is a routine practice that is done every time meat goes on sale; and 3) Complainant did not videotape a single package of chicken to show that it was missing the pre-printed date. *Id.* at 28. Respondent also argued that during her deposition, Complainant changed her story several times regarding the events on April 24, 2014. *Id.* at 29. Finally, Respondent argued that there is no prior evidence of Complainant being disciplined for refusing to change the dates, nor is there any evidence that Respondents partook in such practice. *Id.* at 30.

Looking at the evidence in a light most favorable to Complainant, Complainant had a reasonable belief that she engaged in a protected activity. First, although three boxes in Complainant's videos did have stickers, the video shows that other boxes clearly had the stickers ripped off. Complainant explained why some of the boxes still had stickers, stating that those were not the boxes that she was working on. Because some of the boxes were missing stickers, a reasonable person could find that those boxes in particular may contain expired product.

Second, the fact that removing and replacing price tags is a routine practice does not discredit Complainant's belief. Respondent did not provide sufficient evidence to show that it is standard practice for the meat department manager to remove the stickers before giving them to the meat wrapper. W. Vaquer told the Union and Hunt that he removed the stickers for efficiency but he did not explain that this was standard practice in his store. Third, Complainant's failure to videotape a single package of chicken does not demonstrate that she did not believe that the chicken was expired. The video is of a very short duration (30 seconds) and Complainant did manage to videotape specific boxes with stickers clearly ripped off. Complainant also videotaped the chicken packages inside the boxes. Complainant could not have been expected to note every sign of malfeasance in the course of 30 seconds. A reasonable person with Complainant's knowledge and training, could have believed that that the chicken was past its expiration date.

Fourth, the fact that Complainant changed some of the details of the April 24, 2014 events during her deposition does not mean that she did not have a reasonable belief that Respondent engaged in conduct which violates the Act. Complainant testified almost two years after the April 24 incident. Complainant cannot be expected to recall the events of that day almost two years later with perfect accuracy. Complainant was consistent in testifying about the important details on that day. The fact that Complainant changed who brought her the boxes or how many days Complainant was asked to add to the expiration date does not defeat Complainant's belief. While Complainant testified that part of her belief was based on "Jason's" statements that the meat was expired, Complainant also relied on other evidence. Namely, Complainant noted that the boxes did not have stickers with expiration dates.

Finally, the fact that there is no evidence that Complainant was disciplined for failing to alter expiration dates in the past does not negate Complainant's belief. Complainant has alleged that she was in fact disciplined for failing to alter expiration dates but that the written warnings do not reflect the actual violation. EX 1A at 204-205. Likewise, the fact that there is no evidence that Respondent had the practice of altering expiration dates does not mean that Complainant did not reasonably believe that Respondent engaged in this activity. *See Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006 slip op. at 21 (ARB July 14, 2000) ("It is also well established that the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the aforementioned 'reasonable belief' standard rather than proving that actual violations have occurred."); *Accord Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation). Complainant does not have to establish that Respondent engaged in illegal activity, rather the evidence must show that she had a reasonable belief that Respondent engaged in an activity which violates the Act.

Consequently, drawing all inferences in favor of Complainant, Complainant reasonably believed that she engaged in a protected activity.

b. Did Complainant suffer an adverse action?

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity. *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011); *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White*, 548 U.S. 53 (2006). Complainant alleged that she was terminated for engaging in a protected activity. She has not alleged that her transfer constituted an adverse action. However, Respondent argued that neither the termination nor the transfer constitutes an adverse action. *See Respondent's Brief* at 31-33.

i. Termination

Respondent argued that it did not take any adverse action against Complainant because she terminated her employment by her own action. *See Respondent's Brief* at 31. Respondent cited to several cases for the proposition that job abandonment is equivalent to a resignation and is therefore not an action taken by an employer. *Id.* at 32; *see e.g., Adams v. Verizon New York, Inc.*, 2008 WL 2047815, at *4 (S.D.N.Y. May 13, 2008).

Both parties agree that Respondent terminated Complainant. Complainant alleged in her complaint that she was terminated from employment because she refused to alter expiration dates. Respondent alleged that Complainant was terminated for job abandonment. Because Complainant asserts that she was terminated rather than that she abandoned her job, the disputed issue is the cause of Complainant's termination, and not whether or not she was in fact terminated. The FSMA explicitly defines termination of an employee as an adverse action, stating that no covered entity "may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment" because the employee has engaged in protected activity under the act. 21 U.S.C. § 399d(a).

Complainant's allegations reveal that she was terminated. Complainant did not intend to abandon her job but was instead waiting "for the Union's defense." EX 1A at 419. Complainant notified the Union that she has no intention of abandoning her job. EX 1H. In her letter to Iacono, Complainant explained that she is unable to report to work because the commuting distance to the McDonald Store would impose a hardship on her. *Id.* Complainant also testified that she called the Union on the days that she was supposed to report to the McDonald Store. EX 1A at 427. Complainant testified that she believed she was fired before the Union informed her that failure to report to work would be considered job abandonment and lead to termination. *Id.* at 421.

Drawing all inferences in favor of Complainant, Complainant's termination constitutes an adverse action. Complainant has not conceded that she was terminated for job abandonment; she continued to assert that her termination was due to her protected activity.⁸ Respondent does not assert that Complainant resigned from her position. In fact, Respondent's letter to Complainant and the Union clearly demonstrates that Complainant was terminated.⁹ EX 2T; *see Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 04-STA-26, slip op. at 13 (ARB Oct. 31, 2007) (finding that "except where an employee actually has resigned an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee.").

Consequently, Respondent's termination of Complainant constitutes an adverse action under the FSMA. Contrary to Respondent's argument, Complainant did not terminate her employment by her own action. Complainant's testimony and letter to Iacono reveals that she intended to stay in her job. Complainant did not resign or quit; she was waiting for the Union to step in in order to resolve the issue.

ii. Transfer

Complainant did not expressly assert that her permanent transfer to the McDonald Store was an adverse action in her OSHA complaint. Respondent argued that Complainant's transfer does not constitute an adverse action because a lateral transfer merely four miles away from the prior location cannot reasonably be viewed as discriminatory. *See* Respondent's Brief at 33. Respondent cited to numerous cases for the proposition that a longer commute does not constitute an adverse employment action. *See, e.g., Zinovy v. City of New York Human Resources Administration*, 914 F. Supp. 2d 281, 302 (E.D.N.Y. 2012)("[p]laintiff's longer commute as a result of the transfer to Lombardi is only an inconvenience, however, and cannot constitute an adverse employment action"); *Antonmarchi v. Consol Edison Co. of N.Y., Inc.*, 2008 WL 4444609, at *15 (S.D.N.Y. Sept. 29, 2008)("an inconvenience, such as an increased commute or unfavorable hours, does not constitute an adverse employment action for the purposes of Title VII"); *Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005) ("the only

⁸ The issue as to the cause of Complainant's termination is discussed *infra*.

⁹ In *Carter v. GDS Transport, LTD.*, ARB No. 08-053, ALJ No. 2006-STA-009 (Feb. 27, 2009), a case under the Surface Transportation Assistance Act (STAA), a complainant was terminated for job abandonment. The parties did not dispute that the termination was an adverse action but rather disputed whether the employer's proffered reason for termination, job abandonment, was a pretext for the adverse action. In the present case, there is no question that Respondent terminated Complainant's employment. Complainant argues that her termination was due to her protected activity.

substantive difference between the two positions was that the Elmhurst position resulted in a longer commute—which is an inconvenience, not an adverse employment action.”)

The FSMA does not explicitly provide that a transfer constitutes an adverse action under the Act. Likewise, the Board has not addressed whether a transfer that only results in a longer commute is sufficient for an adverse action under any whistleblower statutes. Complainant has not offered any evidence to support a finding that her transfer resulted in a change to her “compensation, terms, conditions, or privileges of employment.” 21 U.S.C. § 399d(a). While Complainant suggested in her testimony that she was hired to work in the Bronx, she has not provided any evidence that her work location was a condition of her employment. In fact, the evidence shows that Complainant has been transferred several times during her tenure with Respondent.

It is apparent from the record that Complainant refused to accept her transfer because the McDonald Store was too far. *See* EX 1A at 413; EX 1H. Complainant did not provide any other reasons for her refusal; she did not state that the transfer would create hardship apart from a longer commute. Respondents submitted evidence that the McDonald Store is approximately four miles away from the Bedstuy store. *See* EX 2S. Based on the submitted Mapquest directions, Complainant’s commute would increase by approximately five miles, or 12 minutes in commuting time. *Id.* Complainant testified that she drove to work. EX 1A at 401. Other than testifying that the new store was too far, Complainant has not alleged that Respondent’s transfer of Complainant constituted an adverse action nor has Complainant offered any evidence that the transfer would amount to a constructive discharge.¹⁰

Complainant has not demonstrated the hardship that she would suffer as a result of her transfer to the McDonald Store. She did not testify regarding how much her commute would increase or how that would impact her day. Notably, Complainant did not present any other reason for refusing the transfer. Evidence in the record supports a finding that Complainant’s only issue with the McDonald Store was its distance from her residence. Viewing the evidence in a light most favorable to Complainant, Complainant has failed to establish how an increased commute of approximately 12 minutes in duration constitutes an adverse action. Complainant has not alleged that she experienced a change in the terms of her employment such as a demotion, salary decrease, or fewer hours. Complainant has not alleged that her duties and responsibilities would be different at the McDonald Store nor has Complainant alleged that she would be placed in a hostile work environment. There is no evidence that Complainant would

¹⁰ Complainant’s transfer could arguably be construed as a constructive discharge. However, Complainant has not alleged that her transfer to the McDonald Store constituted constructive discharge. The U.S. Supreme Court has held that to establish “constructive discharge,” a plaintiff “must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.” *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 2347 (2004). The United States Court of Appeals for the Second Circuit, under which this case arises, has held that it is also necessary to prove that “the employer deliberately created working conditions that were ‘so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’” *Stetson v. NYNEX Svc. Co.*, 995 F.2d 355, 360-61 (2d Cir. 1993) (under Age Discrimination in Employment Act), *quoting Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). There is no evidence in the record that Respondent deliberately created an intolerable work environment by transferring Complainant.

experience any hardship from relocating other than a longer commute. *See, e.g., Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, slip op. at 15 (July 27, 2006) (finding that complainants' work relocation, while inconvenient, did not change complainant's employment status).

Consequently, there is nothing in the record apart from Complainant's assertion that the McDonald Store is "too far" to demonstrate that the lateral transfer amounts to an adverse action. Complainant cannot defeat a summary decision motion without presenting "significant probative evidence" to support her allegation of unlawful retaliation. Complainant has failed to allege or demonstrate that her transfer constitutes an adverse action in this case.

c. Was the protected activity, if any, a contributing factor to the adverse action?

i. Termination

Complainant alleges that she was terminated for failure to change the sell-by dates on pre-packaged chicken. Respondent alleges that Complainant was terminated for job abandonment. Reviewing the evidence in a light most favorable to Complainant, there is no genuine issue of material fact in regard to the cause of Complainant's termination. The record demonstrates that Complainant's termination was causally related to her job abandonment. Complainant conceded that she did not report to work at the McDonald Store. EX 1A at 415. Complainant also conceded that Respondent terminated her employment after she refused to report to work. *Id.* at 437. Furthermore, the record demonstrates that the Union informed Complainant that if she fails to show up to work, Respondent may terminate her employment. *See* EX1A at 419; EX 1G.

Although not dispositive, there is a gap in time between Complainant's protected activity, i.e. refusal to add new stickers to the chicken, and the adverse action, her termination. Respondent did not terminate Complainant on April 24, 2014, the date of the protected activity. Instead, Respondent terminated Complainant on May 10, 2014, 16 days after the protected activity. "[T]here is no hard and fast rule that any specified amount of time is too removed for an inference of causation," where a "defendant retaliates at the first opportunity that is presented, a plaintiff will not be foreclosed from making out a prima facie case despite a substantial gap in time." *Byrd v. District of Columbia*, 807 F. Supp. 2d 37, 69, fn 24 (D.D.C. Aug. 16, 2011); *Barnabas v. Board of Trustees of District of Columbia*, 686 F. Supp. 2d 95, 105—106 (D.D.C. Mar 1, 2010) (citing *Cones v. Shalala*, 199 F.3d 512, 521 (D.C.Cir. 2000) (citing *Pardo-Kronemann v. Jackson*, 541 F. Supp. 2d 210, 218 (D.D.C. 2008)). Respondent had the opportunity to terminate Complainant at any point from April 24, 2014. There is no evidence in this case that Respondent did not have the opportunity to terminate Complainant on that date or soon thereafter.

In the present case, Complainant's interim actions defeat any causal connection between her protected activity and her termination.¹¹ "[W]hen the protected activity and the adverse

¹¹ Under other whistleblower statutes, courts have held that the inference of causation may be severed by a legitimate intervening event justifying the adverse action. *See Fraser v. Fiduciary Trust Co. Int'l*, No. 14-6958, 2009 WL 2601389, at * 6 (S.D.N.Y. Aug. 25, 2009) (*quoting Tice v. Bristol-Myers Squibb Co.*,

action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.” *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-24, slip. op. at 6. (Jan. 31, 2007) citing *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001); see also *Tracanna v. Artic Slope Inspection Services*, ARB No. 98-168, ALJ No. 97-WPC-1 (Jul. 31, 2001) (“where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised.”). However, an “intervening event” does not necessarily break a causal connection between protected activity and adverse action simply because the intervening event occurred after the protected activity. See, e.g., *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012)(protected activity can be a contributing factor even if the employer also had a legitimate reason for the unfavorable employment action against the employee).

Complainant’s refusal to report to work is an independently significant event which precipitated the adverse action. Complainant refused to alter the expiration dates on produce on April 24, 2014 and was suspended on that day. Complainant has confirmed in her testimony that she was not terminated on April 24, 2014. The following day, Complainant was informed that she was being transferred to the McDonald Ave. store. After failing to report to work, Complainant was terminated effective May 10, 2014. Complainant did not explain why Respondent would wait to terminate Complainant’s employment 16 days after she engaged in the protected activity. There is no evidence in the record showing that Respondent had been prevented from terminating Complainant’s employment sooner. Instead, Complainant worked for another week after she engaged in the alleged protected activity.

Complainant has not offered any evidence that her termination was related to her protected activity apart from her own allegations. The evidence shows that Respondent did not discipline Complainant for her refusal to scale the chicken. See EX 2P. Iacono’s letter to Complainant explaining that Respondent may terminate her employment does not address Complainant’s refusal to follow W. Vaquer’s orders nor does the letter discuss the April 24 incident. See EX 1G. In her letter defending her decision to not report to work, Complainant does not mention the protected activity. See EX 1H.

It is Complainant’s burden to come forth with some evidence to link the adverse action with the protected activity. See e.g., *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec’y Feb. 16, 1989). Complainant, as the party opposing the Motion for Summary Decision, must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. §18.40(c). In viewing the evidence in light most favorable to Complainant, Complainant has failed to establish the causal connection between her protected activity and adverse action she suffered.

Complainant’s actions severed the causal connection between the protected activity and the adverse action. Complainant acknowledged she was transferred to the McDonald Store and

2006-SOX-20, 2006 WL 3246825, at *20 (U.S.D.O.L. Apr. 26, 2006)); *Sussberg v. K-Mart Holding Corp.*, 463 F. Supp. 2d 704, 715 (E.D. Mich. 2006).

did not report there. She also testified that Fontanez warned her that failure to report to work can result in termination. Furthermore, Complainant received notice that failure to report to the McDonald Store could result in termination.

ii. Transfer

As discussed above, Complainant's transfer to the McDonald Store does not constitute an adverse action. Nevertheless, this Decision will briefly address if Complainant's protected activity was a contributory factor to her transfer. Looking at the evidence in a light most favorable to Complainant, Complainant's transfer is reasonably related to her relationship with E. Vaquer and not to her refusal to alter the expiration date.

First, the evidence unequivocally shows that Complainant and E. Vaquer had a poor relationship. Both Respondent and Complainant agree that Complainant had numerous ongoing conflicts with E. Vaquer unrelated to the expiration date issue. EX 1A at 295-307; EX 2P. In her testimony, Complainant listed three arguments that she had with E. Vaquer which did not have any relation to expired meat. *See* EX 1A at 306. As a result of Complainant's actions on April 24, 2014, E. Vaquer called the police and filed a harassment charge against Complainant. EX 2Q. Accordingly, the evidence supports Respondent's decision that E. Vaquer and Complainant can no longer work together.

The ARB has held that a complainant's selective tape recording of activities that are protected under the whistleblower statutes is also protected activity. *Mosbaugh v Georgia Power Co.*, Nos. 1991-ERA-001, -011 (Sec'y Nov. 20, 1995); *Melendez v. Exxon Chems. Am.*, ARB No 96-051, ALJ No. 1993-ERA-006 (ARB Jul. 14, 2000); *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, 2011WL1247208 (ARB Mar. 24, 2011) recon denied 2011WL1663615 (ARB Apr. 13, 2011). However, the ARB has stated that none of their prior decisions are "meant to convey that we condone the surreptitious audio recording of co-workers." *Benjamin v. CitationShares Management, LLC.*, ARB No. 12-029, ALJ 2010-AIR-001, *7, FN6 (ARB Nov. 5, 2013).

While the Board has addressed this issue under other whistleblower statutes, the Board has not specifically addressed whether the FSMA treats a complainant's tape recording of activities that are protected under the FSMA as a protected activity itself. Nor does the FSMA specifically provide protection to employees who videotape protected activity. 21 U.S.C. § 399d(a). Likewise, the final regulations to FSMA's whistleblower provision do not address whether videotaping protected activity is itself a protected activity. *See* Procedures for Handling Retaliation Complaints Under Section 402 of the FDA Food Safety Modernization Act, 81 FED. REG. 22,530, 22,544(Apr. 16, 2016) (codified at 29 CFR Part 1987). Thus, Complainant cannot establish that her videotaping itself constituted protected activity under the FSMA.

In this case, Respondent's decision to transfer Complainant was not because she refused to scale chicken or videotape, but because Complainant and E. Vaquer had an untenable work relationship. While Complainant's decision to videotape led to her suspension, the decision underlying the transfer was based on the effect that Complainant's conduct had on E. Vaquer. The April 25, 2014 meeting following the April 24, 2014 incident discussed Complainant's

conflict with E. Vaquer. EX 1P. E. Vaquer and Complainant described their ongoing conflicts, which were unrelated to the scaling meat incident. *Id.* Notably, the meeting memo has a long summary of E. Vaquer's and Complainant's deteriorating relationship. *Id.* The memo describes fights and arguments. Under "results of meeting," Hunt wrote that based on what he heard today about their relationship and the harassment charge, he explained to E. Vaquer and Complainant that they cannot work together. *Id.*

Second, Respondent's documents and Complainant's testimony reveal that Complainant has been transferred to different stores due to employee conflicts in the past. Respondent explained, with supporting documentation, that Complainant was transferred rather than another employee due to the Union's CBA, which bases transfers on seniority. *See* Hunt Decl. Respondent offered support for transferring Complainant as opposed to another employee. Third, Complainant has not offered any evidence to establish a relationship between the protected activity and her transfer. Because Complainant has failed to allege that the transfer constitutes an adverse action, she has not raised a genuine issue of material fact regarding this element.

Accordingly, the record demonstrates that Complainant had an ongoing conflict with E. Vaquer, has been previously transferred due to employee conflicts, and had less seniority than E. Vaquer under the CBA. Presuming that Complainant's transfer is an adverse action under the Act, Complainant's protected activity was not a contributing factor to the transfer.

2. Did Respondent demonstrate by clear and convincing evidence that it would have taken the adverse employment action regardless of Complainant's engagement in the protected activity?

Even presuming that Complainant's refusal to change the sell-by date on the chicken packages was a contributory factor to her transfer and termination, Respondent has demonstrated by clear and convincing evidence that Respondent would have taken the same employment actions in the absence of protected activity. "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." *Clarke*, ARB No. 09-114, slip op. at 4 (internal quotation marks deleted)(citations omitted). *See also DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012).

The Board has held that the standard for clear and convincing evidence

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

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

In *Speegle*, the Board defined the meaning of the terms “clear” and “convincing.” The employer has presented “clear” evidence if the employer presented unambiguous explanations for the adverse actions in question. “Convincing” evidence is evidence demonstrating that a proposed fact is “highly probable.” *Speegle*, ARB No. 13-074, slip op. at 6 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

Looking at the first factor, Employer presented clear and convincing evidence that Claimant’s non-protected activity, refusal to report to work, was independently significant. First, Employer presented clear evidence for its decision to terminate Complainant; Employer explained that it terminated Complainant after she was told to report to work and refused to do so. As summarized above, the parties do not dispute that Complainant refused to report to work. EX 1A at 415; EX 2P. Second, Employer presented convincing evidence that it would have terminated Complainant for refusing to report to work. A third party, the Union, warned Complainant that her refusal to report to work can result in termination. EX 1G. Furthermore, Complainant acknowledged that the Union warned her that refusal to report to work can result in termination. EX 1A at 419.

Under the second factor, there is an abundance of evidence showing that Respondent would have taken the same adverse action. Iacono’s May 9, 2014 letter to Complainant demonstrates that Complainant’s failure to report to work would result in termination. See EX 1G. In his April 25, 2014 meeting memo, Hunt expressed concern over Complainant’s failure to report to work. EX 2P. Notably, Hunt visited Complainant while she was covering E. Vaquer’s shift at the Bedstuy Store to ask her why she did not report to the McDonald Store. EX 2P. Hunt noted that Complainant called the Union who told her that she could lose her job if she does not report to work. EX 2P. Thus, the Union warned Complainant of the termination risk at least on two occasions and Respondent’s Vice-President of Operations personally visited Complainant to address the issue. Respondent’s rationale for terminating Complainant has been unwavering; Respondent has consistently argued that Complainant’s termination was due to job abandonment. EX 1G; EX 2P. Respondent’s termination of Complainant follows Complainant’s non-protected activity, i.e., her failure to report to the McDonald Store. After Complainant’s protected activity, she worked for a week at the Bedstuy Store. EX 2P. Respondent did not take any action against Complainant at this time. It was only until Complainant’s refusal to report for work that Respondent took action.

Under the third factor, Respondent would have terminated Complainant in the absence of the protected activity. Looking at the bare sequence of events, Complainant’s alleged protected activity had a domino effect on what happened subsequently. However, it was Complainant’s intervening actions that ultimately led to Respondent’s decision to terminate Complainant. After Complainant refused to put new stickers on the meat packages, W. Vaquer directed E. Vaquer to complete the task. Complainant then made the decision to videotape. As a result of Complainant’s actions, E. Vaquer filed a harassment charge, and Complainant was suspended. The Union and Respondent determined that Complainant and E. Vaquer could not work together and decided to transfer Complainant because E. Vaquer had more seniority under the CBA.¹² After Complainant was transferred, she refused to report to the McDonald Store. Respondent

¹² As summarized above, Complainant had a well-documented on going conflict with E. Vaquer unrelated to the protected activity.

then terminated Complainant for failure to report to work. There is no evidence to suggest that this decision would have been different had Complainant not engaged in the protected activity.

Viewing the evidence in a light most favorable to Complainant, Respondent has demonstrated by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity. Specifically, Respondent has demonstrated that it terminated Complainant's employment because she refused to report for work.

VII. CONCLUSION

Summary decision in favor of Respondent is appropriate because there is no genuine dispute as to any material fact. Complainant engaged in a protected activity by refusing to engage in conduct which she reasonably believed violates the FSMA. Respondent terminated Complainant, which is an adverse action under the Act. However, the protected activity was not a contributing factor in the adverse action. Additionally, assuming that the protected activity was a contributing factor in the adverse action, Respondent has demonstrated by clear and convincing evidence that it would have terminated Complainant regardless of the protected activity.

VIII. ORDER

Respondent's Motion for Summary Decision is hereby GRANTED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey