



**Issue Date: 15 March 2019**

**Case Number: 2016-FDA-00008**

*In the Matter of:*

**THOMAS D. HAGOOD,**  
*Complainant*

v.

**BUFFALO WILD WINGS,**  
*Respondent.*

**ORDER OF DISMISSAL**

This case arises under Section 402 of the Food Safety Modernization Act (“FSMA”), 21 U.S.C. § 399d, and the regulations at 29 C.F.R. Part 1987.

On or about August 14, 2015, the South Carolina Occupational Safety and Health Administration (“SCOSHA”) received a whistleblower complaint filed by Thomas D. Hagood (“Complainant”) alleging that his former employer, Buffalo Wild Wings (“Respondent”), fired him on April 13, 2015 in retaliation for voicing food safety concerns.<sup>1</sup> On or about May 12, 2016, SCOSHA forwarded the complaint to the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), Atlanta Regional Office, advising that SCOSHA had received a complaint filed by Mr. Hagood “under the whistleblower provisions of the Food Safety Modernization Act, which appears some items fall under your jurisdiction. Please handle as you deem appropriate.”

After investigating, OSHA’s Atlanta Regional Administrator issued findings on June 13, 2016 dismissing the complaint as untimely filed. On July 1, 2016, Complainant, through then retained counsel, filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“Office”), asserting the complaint was timely filed. Through no fault of the parties, this Office has taken no action in the matter since receiving Complainant’s objections on July 6, 2016.<sup>2</sup>

Because of this lengthy period of inactivity, on January 31, 2019, I issued a *Notice of Docketing, Order Requiring Submission of Statement of Intent to Proceed and Order to Show Cause* (“Order”) instructing Complainant, within 15 days of the Order, to file a *Statement of Intent to Proceed* (“Statement

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<sup>1</sup> Complainant alleges he was suspended after reporting witnessing a co-worker picking up food off the floor and serving it to a customer. He alleges he was subsequently terminated after refusing to sign a write-up faulting him for the incident.

<sup>2</sup> On November 16, 2016, this Office did hold a preliminary conference call with counsel for Complainant and Respondent, at which Complainant’s counsel stated she was no longer representing Complainant. That statement was treated as a request to withdraw as counsel of record, and approved.

of Intent”) alerting this Office whether or not he still wanted a formal hearing before an Administrative Law Judge. The January 31, 2019 Order also instructed Complainant, if he opted not to withdraw his request for hearing, to show cause within 30 days why his complaint should not be dismissed as untimely filed, to include any reasons why the statutory filing period should be equitably tolled.<sup>3</sup> To date, this Office has not received Complainant’s Statement of Intent or any other filing responsive to the January 31, 2019 Order.<sup>4</sup> Complainant was warned that failure to file a Statement of Intent or a responsive filing could result in dismissal of the case.

The regulations at 29 C.F.R. § 18.57(b)<sup>5</sup> provide that:

If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

Complainant was expressly warned in the January 31, 2019 Order that failure to file a Statement of Intent or a responsive filing addressing the timeliness of the complaint could result in dismissal of his complaint.

Based on his failure to participate in the above captioned proceeding and respond to this tribunal’s orders, Complainant’s July 1, 2016 request for hearing is DISMISSED, without prejudice.

SO ORDERED.

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

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<sup>3</sup> The Order noted that under the statute and applicable regulations, an FSMA complaint must be filed no later than 180 days after the date that an alleged violation of the Act occurs and should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed. 29 C.F.R. § 1987.103(c), (d). The Order further noted that documentation submitted in this case reflects that Complainant was fired on April 13, 2015 and that SCOSHA received Complainant’s complaint on August 14, 2015 and forwarded it to the U.S. Department of Labor’s OSHA office on or about May 12, 2016, or more than 180 days after Complainant was terminated. However, the Order also advised Complainant that the FSMA’s 180-day filing period could be equitably tolled for extenuating circumstances, to include mistakenly filing an otherwise timely complaint regarding the same statutory claim with another agency. Finally, the Order instructed Complainant that, as the complaining party, it was his burden to demonstrate why equitable principles should be applied to toll the limitations period. *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

<sup>4</sup> This Office has not received any returned mail sent to Complainant.

<sup>5</sup> 29 C.F.R. § 1987.107 provides that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. Part 18 apply to these proceedings “[e]xcept as provided in this part.”

**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).