



Issue Date: 30 September 2020

CASE NO.: 2016-FDA-00009

In the Matter of:

DEON D. HOLLOWAY,
Complainant,

v.

JOGUE, INC.,
Employer.

APPEARANCES:

Deon D. Holloway
Self-Represented

Chris Parfitt, Esq.
Deneweth, Dugan & Parfitt
For Respondent

BEFORE: CARRIE BLAND
Administrative Law Judge

**DECISION AND ORDER
AWARDING DAMAGES**

This matter arises under the employee protection provisions of the Federal Food, Drug and Cosmetic Act (“FDCA”), 21 U.S.C. § 1021, as amended by the FDA Food Safety Modernization Act, 21 U.S.C. § 339(d), hereinafter “FSMA” or “the Act.” The claim is governed by the Act and implementing regulations found in the Code of Federal Regulations, Title 29, Part 1987 (“the Regulations”). The Act provides protection from retaliation for an employee who has engaged in protected activity pertaining to a violation or alleged violation of the Act, or any order, rule, regulation, standard, or ban under the Act. 29 C.F.R. § 1987.100.

Background and Procedural History

Deon D. Holloway (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on March 24, 2014. In his complaint, he alleged that he was ignored by management and ownership at Jogue, Inc. (“Respondent”) when he reported old, outdated, and contaminated products. Complainant further alleged that he had been personally reprimanded by Respondent’s CEO as a result of his actions. On August 4, 2015, Complainant filed an Amended Whistleblower Complaint that alleged that he was terminated for his reports and opposition to perceived food safety violations. The Amended Complaint further alleged that after Complainant was terminated, Respondent offered Complainant a different position at a different work facility at reduced pay.

On August 25, 2015, Respondent filed its Position Statement and Response to Whistleblower’s Complaint (“Response”). In its Response, it provided a list of five claims that Complainant had filed with various government agencies. Respondent also averred that Complainant was never terminated from his employment but rather that Complainant never returned to work as a result of a slip and fall on March 22, 2014.

After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator for OSHA, Chicago, Illinois, issued a final determination letter dated June 8, 2016, dismissing the complaint. The letter stated that the complaint was timely filed and that both Complainant and Respondent were covered by the FSMA. Further, the investigator determined that Complainant was not removed from his job due to FMSA protected activity. Finally, the letter indicated that it was determined that there was no adverse employment action taken against Complainant as a result of his FMSA protected activity.

On June 25, 2016, Complainant filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“OALJ”). On November 28, 2016, I issued a *Notice of Assignment and Pre-Hearing Order*, setting a hearing date. (ALJX 1)¹.

On September 13, 2017, I convened a formal hearing in Detroit, Michigan. All parties were afforded a full and fair opportunity to present evidence and argument. Mr. Holloway represented himself in this matter.² (Tr. 4). The following were accepted into evidence: Complainant’s Exhibits L-N, and Q-S (Tr. 63, 66, 68, 69, 72)³, Respondent’s Exhibits 1-4, 6, and 8-20 (Tr. 28, 234), and Administrative Law Judge Exhibits 1-8. (Tr. 9). The record remained open post-hearing for the submission of post-hearing briefs. (Tr. 242). Respondent submitted its brief on September 16, 2019. Complainant did not file a brief.⁴

¹ The following references will be used: “Tr.” for the official hearing transcript; “CX” for a Complainant’s exhibit; “RX” for a Respondent’s exhibit; and “ALJX” for an Administrative Law Judge’s exhibit.

² Complainant’s counsel submitted a letter to withdraw as counsel on December 20, 2016, and I issued an order granting the request on February 2, 2017.

³ At the hearing, Complainant sought to admit a number of exhibits as video recordings. I issued an Evidentiary Order on July 8, 2019, denying the admission of the videos. Complainant then filed a Motion for Reconsideration which was denied on March 2, 2020. The reasoning for those determinations is incorporated herein by reference.

⁴ Complainant was afforded four opportunities to submit a closing brief. First, subsequent my Second Evidentiary Order issued on July 8, 2019. Second, after my Order Denying Complainant’s Motion for Reconsideration issued on March 2, 2020. Third, in response to a request for courtesy copies of the admitted exhibits, sent on April 27, 2020.

The following findings and conclusions are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and relevant precedent. Although I do not discuss below every exhibit in the record, I carefully considered all the testimony and exhibits in reaching this decision.

Issues Presented

1. Whether Complainant engaged on protected activity;
2. Whether Complainant was subjected to one or more adverse employment actions;
3. Whether the Complainant's protected activity was a contributing factor in the adverse employment action(s); and
4. Whether, if the protected activity was a contributing factor, Respondent would have taken the same adverse action in the absence of the protected activity.

Summary of the Relevant Evidence⁵

I. Complainant's Testimony (Tr. 40-112)

Direct Examination

Mr. Holloway commenced his testimony by describing the perceived culture while working for Respondent. He stated that the owner, Mr. Sastry, and other upper management would instruct him to add additional ingredients to products after they were finished and checked for quality. He then stated that when he would object to these practices, he would be reprimanded and cursed at. Complainant described instances where he was instructed to hide rusty cans in the basement whenever an inspector was scheduled to come to the plant. He indicated that he was also concerned about the practice of adding older, expired, ingredients to newer formulas and still shipping them out.

Complainant testified about when he informed Respondent's owner that he would have to report an incident where bathroom water was used in the manufacturing of one of their products. Complainant testified that he thought it was wrong to serve people from the bathroom and that the use of the water from the bathroom, "was like the straw that kind of broke the back, where I just had to address Mr. Sastry and let him know that out of all these things, that was just as low as you can get." Mr. Holloway testified that as a result of his conversation with Mr. Sastry, he received an email stating that Respondent no longer had any work for him due to a work

The final opportunity came after my Final Order for Complainant's Exhibits and Closing Brief issued on August 13, 2020.

⁵ In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-00013, PDF at 2 n. 3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board ("ARB") noted that an administrative law judge ("ALJ") need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

restriction that required Complainant to sit 90 percent of the time. Complainant then testified that his 90 percent work restriction had been the same for the past two years.

At the conclusion of Complainant's direct examination, I attempted to clarify what Complainant believed to be the adverse employment action taken against him, stating, "You need to prove what adverse employment action has happened, and I'm hearing you believe you were terminated." Complainant then responded, "Actually, just from there -- it's send him home, we can't use him, something to that effect, from Anil Sastry." Tr. 47.

Cross Examination

Mr. Holloway was asked about his job when he first started working for Respondent. He stated that he began working in 2010 as a night-shift supervisor and only held that position for a few months because the night-shift was eventually shut down. After his position as a night-shift supervisor, Complainant testified that he was transferred to a different plant owned by Respondent to begin work as a compounder.

Complainant was then asked about instances in which he was written up while working for Respondent. When asked if he thought he was being singled out, Complainant testified, "There seemed to be an issue with me not wanting to falsify stuff to why I might have gotten some kind of attention." Further, Complainant testified to the circumstances surrounding his return to work after he was informed that Respondent did not have work for him due to his 90 percent sitting work restriction. Complainant maintained that even though Respondent hired him back at a job in which they stated he could sit 90 percent of the time, he was actually working on the production line and performing tasks such as loading the bottles on the line or taking out the garbage. Mr. Holloway further testified that his supervisors were aware of his work restriction, but would still instruct him to perform tasks not in accordance with the restrictions.

Complainant was asked to reread RX 6 which is an employment letter sent to Mr. Holloway from Andrew Huber, Respondent's human resources manager, after he was laid off work in February of 2014. Complainant disagreed with some of the language in the letter that seemed to indicate that Complainant's 90 percent work restriction was different than the restriction he had for the two years prior to being laid off. Complainant additionally clarified that his compensation was the same both before and after he was laid off and returned to work for Respondent. Further when asked about his understanding of the letter, Complainant testified that the letter was, "a way to cover up what actually occurred, in terms of why I was actually let go. It had nothing to do with restrictions, as these were the same restrictions I've had for almost two years."

Complainant then testified that he was subsequently notified that Respondent had a new job for him at a different facility, and that Respondent would honor his 90 percent sitting work restriction. Mr. Holloway further stated that his job included various additional duties outside of merely sitting. Complainant received a follow-up question asking if he had ever formally complained to anyone about working beyond his restrictions. Complainant stated that he was informed by his supervisors and Respondent's owner to perform work that was outside of his restrictions, and was never reprimanded for working outside of his restrictions.

Complainant was then asked about the circumstances surrounding why he eventually stopped working for Respondent. Complainant testified that he had not been back to work because he suffered a fall in the parking lot on March 22, 2014. Complainant was then asked if he agreed that Respondent never terminated his employment, to which Complainant testified, "As I can recall, I've never seen anything like that."

Respondent's counsel next asked Mr. Holloway about his prior testimony regarding mold being present at the plant. Complainant acknowledged that he was not qualified to make a determination about whether he was actually seeing mold, and that he commonly informed the quality head at the plant. Complainant explained that on more than one occasion he alerted the quality head to the presence of mold and was told that the substance was in fact mold. Complainant further testified that he presented the mold to Mr. Sastry who then instructed Complainant to throw the product away. However, the product was still shipped out.

Complainant was then asked about RX 12, which is an August 4, 2014, email sent from Complainant to Respondents' owner and human resources manager, keeping them up to date on Complainant's recovery from his injury and informing them that Complainant had communicated with the proper authorities regarding his public safety concerns. Complainant then testified that the only other instance in which he notified Respondent about his intent to contact public authorities was a conversation with Mr. Sastry a few days prior to being laid off in February 2014. Mr. Holloway was then asked if he believed that his conversation with Mr. Sastry in February 2014 was the reason he was off work for two to three weeks, to which Complainant testified, "Because I reported the bathroom water being used, I was shown the door from the company and put to somewhere else."

Redirect Examination

On redirect, Complainant addressed the issue of his 90 percent work restriction. He stated that the restrictions he had been handing into his supervisor were the exact same for the two years prior to being laid off. Complainant then testified that his being laid off had more to do with the conversation he had with Mr. Sastry a few days prior.

II. John Leavens Testimony (Tr. 112-126)

Direct Examination

John Leavens testified that he had worked for Respondent for 34 years and was the plant manager who supervised Complainant. Mr. Leavens testified that Complainant started at the plant as a compounder, and transitioned to a sitting job as a labeler towards the end of his time working for Respondent. Regarding Mr. Holloway's medical restrictions, Mr. Leavens indicated that he was aware of the restrictions and never instructed Mr. Holloway to perform outside of those restrictions.

Mr. Leavens was asked about whether or not Mr. Holloway ever complained to him about working conditions at the plant. Mr. Leavens testified that Complainant never directly

complained to him about sanitary conditions including the presence of mold. Mr. Leavens also conceded that the majority of his coworkers had noticed that the chemicals used to make the products were corrosive, however there were quality control procedures in place to ensure safety.

Mr. Leavens was next asked about the circumstances surrounding Complainant being laid off and transferred to a new plant. Mr. Leavens stated that the personnel involved in relocating Complainant were himself, Mr. Sastry, and Respondent's human resources manager. He further testified that Complainant was transferred to a new plant to ensure that he had a job.

Cross Examination

Complainant started by asking Mr. Leavens about Complainant's job responsibilities while he worked for Respondent. Mr. Leavens stated that he witnessed Complainant doing physical labor, however he did not recall seeing Complainant do any heavy work during his last year with Respondent. Mr. Leavens stated that he was unaware of how long Complainant's restrictions had been in place, but also that he would not have given Complainant heavy duty work after his restrictions were put in place unless it were to train someone.

Mr. Leavens was then asked about Respondent's policies regarding inspections of the plant by the FDA and other agencies. Complainant asked Mr. Leavens if the cleaning done prior to an inspection included, "taking hundreds of our flavors and putting them on skids and hiding them in the basement?" Mr. Leavens testified that the flavors were moved to the basement for reevaluation, not in an attempt to hide them. Mr. Leavens also testified that it was a coincidence that flavors would be relocated prior to FDA inspections.

Redirect Examination

The only question Mr. Leavens was asked on redirect was whether or not Complainant ever complained to him about doing full duty work, to which Mr. Leavens responded, "No."

III. Mima Iovtceva Testimony (Tr. 127-140)

Direct Examination

Ms. Iovtceva testified that she had been working for Respondent for twelve years, and had spent the past five years as the quality control and product development manager. She also clarified that the FDA inspections of the plants were all unannounced. Ms. Iovtceva then testified that she worked with Complainant when he started as a compounder and that Complainant eventually transitioned into working as a labeler.

Ms. Iovtceva was then asked about the reports of mold at the plant. She testified that products which were considered at-risk for mold were usually frozen, and quality control would do microbiological testing and infrared spectrometer testing to ensure that there was no mold in the products. Ms. Iovtceva then was asked if she ever remembered an instance where Complainant came to her with a mold issue. Ms. Iovtceva testified that she only remembered

one instance where Complainant reported mold, and she informed Complainant that what he thought was mold was actually fat from the chocolate.

Cross Examination

Mr. Holloway started by asking Ms. Iovtceva about the incident where he alerted her to potential mold in one of the products. When asked whether Respondent ever sold mold to people in their food, Ms. Iovtceva responded by saying, “We don’t sell moldy food.” She was next asked about the practice of mixing older products into newer drum containers. Ms. Iovtceva stated that you are able to place older product in with a newer product to do a shelf life extension, allowing an older product to get an updated expiration date. She went on to explain to Complainant how retention samples are used from suppliers to ensure that products are getting the proper shelf life extensions.

IV. James Mong Testimony (Tr. 140-150)

Direct Examination

Mr. Mong testified that he worked for Respondent for 15 years, and had worked as a compounder. He further stated that he worked with Mr. Holloway when Complainant was supervising the night shift. Regarding Complainant’s job performance as a night shift supervisor, Mr. Mong concluded that Complainant’s performance was poor and stated that Complainant would lock employees out of the building when the employees took their lunch breaks, and also that Complainant would sleep on the job.

Mr. Mong was then asked about an issue with Complainant using various ingredients during the manufacturing process. He testified that Complainant would, “use synthetic chemicals and then he would sit there and say that we didn’t have it.” Mr. Mong then testified that he would show Complainant where particular ingredients were and Complainant would respond by saying, “I don’t want to see that, just keep your mouth shut.” When asked what he believed to be Complainant’s rationale for acting this way, Mr. Mong testified, “He was out against the company.” Mr. Mong further stated that Complainant would complain about everything even if Complainant was informed that he was incorrect and the product was compliant.

Mr. Mong then testified about his personal experience of having a work restriction, in addition to Complainant’s actions when Complainant was on work restrictions. He stated that Respondent always accommodated his restrictions and Respondent would ensure that he did not exceed his restrictions. Mr. Mong then testified that he witnessed Complainant lifting items in excess of his restrictions. Further, he testified that Complainant would assert that his supervisors were forcing him to break his restrictions, and that Complainant had the mindset that everyone was out to get him.

Cross Examination

Complainant started by asking Mr. Mong about the procedure of combining older product with newer product. Mr. Mong testified that the process was called “rework product”, where you take leftover product from a previous batch and combine it with a new product that had the same ingredients. He further stated that the combined product would be given a new shelf life if quality control deemed it good for consumption. In the end, Mr. Mong testified that he would always check with quality control if he questioned a certain product, and would then follow their guidance on whether to rework a product or dispose of it.

V. Michael McFerran Testimony (Tr. 150-161)

Direct Examination

Mr. McFerran testified that he had been working for Respondent for five years as a compounder and that he worked with Complainant at the same facility. He stated that he would speak with Complainant frequently and considered him to be a friend. Mr. McFerran then described an incident where Mr. Holloway was assigned a thousand-gallon formula for lemon extract, and that Complainant believed he was being assigned an excessively large formula as a punishment for missing a few days of work. Mr. McFerran further stated that he eventually informed his supervisor, Mr. Leavens, about the formula, and Mr. Leavens denied that Complainant was given a formula for a thousand gallons. Mr. McFerran then disclosed to Complainant that Mr. Leavens had been informed of the situation, after which the Complainant became upset and eventually stopped speaking with Mr. McFerran.

Mr. McFerran next testified about his observations of how Respondent handled its employees’ work restrictions. He stated that when people had documentation they were always either seated or given a position set to their restrictions.

Cross Examination

Mr. McFerran was asked by Complainant about whether or not he witnessed the Complainant doing full duty work in his last year of employment with Respondent. Mr. McFerran testified that he witnessed Complainant doing full duty work previously, but did not witness him performing those duties during his last year.

VI. Jason Stone Testimony (Tr. 161-172)

Direct Examination

Mr. Stone testified that he had been working for Respondent as a “cook with extra responsibilities” for five years. Mr. Stone was then asked about the incident where Complainant was allegedly given a formula for one thousand gallons of lemon extract. Mr. Stone testified that Complainant informed him that Mr. McFerran had talked to Mr. Leavens about the thousand gallon formula and that Complainant was upset with Mr. McFerran for informing a supervisor.

Cross Examination

Mr. Stone was first asked about the kind of work Complainant was performing during times they worked together. Mr. Stone acknowledged that Complainant was placed on restrictions after his injury in 2012, however Complainant would perform full/heavy duty work at times. Mr. Stone then testified to the presence of mold in products at the plant. He stated that he noticed mold at times, but never saw a moldy product being distributed after it was discovered. He further indicated that if someone notices mold, the procedure is to inform quality control so that they can assess the situation.

Mr. Stone was then asked about instances where he would run out of water while cooking at the plant. Mr. Stone testified that it had only happened two times since working for Respondent. He further indicated that at one point he filled a kettle with water from the break room to heat enough water to make a certain formula. Mr. Stone then denied ever using bathroom water in the cooking process.

VII. Andrew Huber Testimony (Tr. 173-195)

Direct Examination

Mr. Huber testified that he had been with Respondent since 1999, and as of the date of the hearing, was CFO and administrative manager. He stated that part of his job responsibilities were to maintain human resources and personnel files on Respondent's employees. Mr. Huber then testified that prior to Complainant being laid off for a few weeks in February 2014, his hourly wage was \$11.00 an hour, and that his wages were reduced to \$10.10 an hour after he returned to work in March 2014.

Mr. Huber was next asked if Complainant had ever received write-ups during his career with Respondent. The first instance was identified in RX 14 from February 24, 2011. The write-up stated that Complainant packed products with loose caps, and received one day off without pay for this mistake. The next instance was identified in RX 15 from March 13, 2012. The write-up stated that on August 19, 2011, Complainant added, "5.75 pounds of blue one instead of 5.74 ounces per batch card." Further, RX 15 also indicated that on March 3, 2012, Complainant, "did not follow instructions on a batch card and added lime oil five-fold instead of lime oil. Product deemed not acceptable. Damage incurred \$6,023.60 on the first mistake. An additional \$3,378.75 on the second mistake for a total of \$9,402." Mr. Huber then discussed Exhibit 16 which was a write-up from December 28, 2012. The write-up stated that Complainant used a drum heat band in a wet room environment which could have created an electric shock. Further, Mr. Huber talked about the incident identified in RX 17 from January 24, 2013. The write-up stated that Complainant failed to show up to work without informing someone. Mr. Huber then testified about RX 18 which was an email from the general manager of the plant where Complainant worked. The general manager stated that Complainant was a chronic liar who has an excuse for everything, and that Complainant would take product to be quality checked and lie about what was in the product. The final write-up Mr. Huber discussed was RX 19 from March 13, 2013. The write-up stated that Complainant did not follow the rules and left one of the tanks dirty after using it.

Mr. Huber then stated that Complainant did not inform Respondent of a preexisting condition prior to being hired, and that Complainant was placed on limited duty starting in August 2012. Mr. Huber next testified that he observed Complainant breaking his own restrictions on occasion, and witnessed Complainant scaling a shelf in the warehouse to get inventory. Further, Mr. Huber testified that Complainant was supposed to be doing rehab, but that Complainant stated he was unable to attend rehab due to a lack of time and money. Mr. Huber then informed Complainant that Respondent would be willing to work around his schedule and that Complainant had health insurance that would cover the costs of rehabilitation.

Mr. Huber was next asked about RX 8 which was Complainant's work restriction note from February 2014. Mr. Huber stated that the restrictions laid out in this note were similar, if not a little more restrictive than Complainant's prior restrictions. Mr. Huber then explained that at the time of Complainant's February 2014 restrictions, there was no job available to accommodate Complainant's restrictions. He further testified that a job was eventually found for Complainant around the end of February and there was delay in informing Complainant of the position because the number Complainant's supervisor attempted to contact was disconnected.

Mr. Huber then testified about the circumstances surrounding Complainant's last day of work for Respondent. Mr. Huber stated that Complainant suffered a slip and fall in the company parking lot on March 22, 2014. He further testified that since that date, Complainant had not been back to work and that Respondent never terminated Complainant's employment.

Cross Examination

Complainant began by asking Mr. Huber what his understanding was of Complainant's restrictions. Mr. Huber stated that he never personally saw the restriction indicating that Complainant be seated 90 percent of the time, however he did state that from 2013 to 2014, Complainant was on limited duty. Mr. Huber was then asked if there was instance where he would have directed Complainant to move mold out of the way from within a product, to which Mr. Huber testified, "No."

VIII. Anil Sastry Testimony (Tr. 195-209)

Direct Examination

Mr. Sastry testified that he was one of Respondent's owners and CEO, and had been since 2003. He then provided some background on Respondent and stated that Respondent was a manufacturer of flavors and extracts with five facilities throughout the United States. Mr. Sastry then indicated that the FDA does routine, unannounced, inspections of Respondent's plants, and that Respondent also pays NSF International \$5,000 a year to audit the facilities.

Mr. Sastry then stated that Ms. Iovtceva and her team were in charge of ensuring that the quality of the products were in compliance with the FMSA, and that her team attended classes to ensure they were up to date on quality standards.

Mr. Sastry was next asked about his understanding of Complainant's work history with Respondent. He testified that Complainant was hired in 2010 as a supervisor, but was reassigned after complaints that Complainant was waiting at the back door for his lunch, people were getting locked out, and the production of Complainant's shift was low. Mr. Sastry testified that Respondent gave Complainant another opportunity as a compounder at a different facility. Mr. Sastry did acknowledge that Complainant voiced his concerns over numerous things including issues with mold.

Mr. Sastry was then asked about an incident involving Complainant and synthetic ingredients. He testified that Complainant would take batch cards and intentionally doctor them and slip them into production. In terms of how Complainant was intentionally harming Respondent, Mr. Sastry stated that Complainant was adding "synthetic" to some ingredients in the hope that an auditor would witness the doctored batch card.

Mr. Sastry was then asked about RX 12, Complainant's August 4, 2014 email to Mr. Huber updating him on his surgery. Mr. Sastry stated it was clear by Complainant's verbiage that RX 12 was the first time Complainant was complaining about quality standards. Mr. Sastry then testified that he had never previously discussed Complainant informing higher authorities. Mr. Sastry reiterated that Respondent takes quality personally and they welcome auditors into their facility.

Cross Examination

Mr. Sastry was asked about his understanding of Complainant's work restrictions. Mr. Sastry stated that he was unaware of Complainant's specific restrictions, but he was certain that Complainant's supervisors would not command Complainant to break his restrictions. Mr. Sastry then confirmed that Complainant was instructed to stay seated and label products, and that it was not the job of one of Complainant's coworkers to keep Complainant in line with his restrictions.

Complainant then asked Mr. Sastry if he was ever upset with Complainant for not falsifying a batch card, to which Mr. Sastry testified, "I was upset with you for falsifying the batch card by putting down synthetic on something when we had the natural chemical right there in front of your face."

My. Sastry was next asked about Respondent's internal communications prior to an inspection. Mr. Sastry stated that Complainant would not have been assigned to place rusty cans in the basement in order to hide them from inspectors. He further stated that the purpose of taking the cans to the basement was to properly test the chemicals within the cans, and possibly transfer chemicals from a rusty can to a different container.

Complainant also asked Mr. Sastry about using bathroom water to make the food products. Mr. Sastry did not recall that happening, and reiterated that the bathroom water was filtered in the same way that the regular water was. Complainant then asked Mr. Sastry if he remembered having a conversation with Complainant about an issue with the use of bathroom water, to which Mr. Sastry stated that he did not recall that conversation.

SPECIFIC FINDINGS OF FACT

Respondent is engaged in the manufacturing of flavors and extracts for the food service industry.

Complainant began working for Respondent at their Plymouth plant in 2010 as a night-shift supervisor at an hourly rate of \$11 an hour. After a few months, Complainant was relocated to Respondent's Northville plant as a compounder at an hourly rate of \$11 an hour.

At all relevant times, Complainant was an employee of Respondent.

Complainant had been on a 90 percent sitting work restriction since August of 2012.

On or about February 15, 2014, Complainant verbally informed Mr. Sastry he would have to report an incident where bathroom water was used in the manufacturing of Respondent's products.

On February 18, 2014, Complainant submitted a Doctor's note stating Complainant must be seated 90% of the time while working.

On February 19, 2014, Mr. Sastry informed Complainant's supervisor, John Leavens, to send Complainant home because Respondent could not "use him" due to his February 18, 2014 work restrictions. Mr. Sastry further informed Mr. Leavens to convey to Complainant that he would be able to return to work once a doctor cleared him to do so.

Complainant was laid off without the promise of additional work from February 19, 2014 to March 16, 2014.

Complainant was laid off due to his conversation with Mr. Sastry on or about February 15, 2014, where he stated he would have to report his perceived health violations.

On February 25, 2014, Mr. Huber sent Complainant a letter acknowledging that Complainant again submitted a 90 percent sitting work restriction on February 18, 2014. Mr. Huber stated that the restriction "eliminates any manufacturing position we have at Jogue." Mr. Huber concluded by asking Complainant to inform Respondent of his plans to either rehabilitate his injury or find alternative employment.

Complainant was re-employed at the Plymouth plant on March 17, 2014, at an hourly rate of \$10.10.

On March 22, 2014, Complainant was injured at work when he slipped and fell on ice, and has not returned to work for Respondent since.

The Social Security Administration determined Complainant was disabled starting on March 22, 2014, and began monthly disability payments in September of 2014.

Complainant is disabled and cannot work any full-time employment.

After Complainant resumed employment with Respondent on March 17, 2014, his employment was never terminated.

Complainant filed a timely OSHA complaint on March 24, 2014.

DISCUSSION

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).

In a cause of action for retaliation under the FSMA, the complainant must establish, by a preponderance of the evidence that: (1) they engaged in a protected activity; (2) they suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action. *See* 29 C.F.R. § 1987.109. If the complainant satisfies this burden, the respondent may prohibit the order of relief if it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. *Id.* Generally, in whistleblower regulations, a contributing factor is a factor that tends to affect in any way the outcome of a decision. *See Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (D.C. Cir. 1993).

I. Applicability of the Act

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 “manufactures flavors, fragrances, extracts, and special dairy ingredients, including custom formulations as well as those produced under private labels.” RX 2. Additionally, Respondent’s CEO stated that Respondent is a manufacturer of flavors and extracts for the food, beverage, confectionary, and baking industries. Tr. 195. Accordingly, Respondent is a covered entity under the Act as it is engaged in, *inter alia*, the manufacture 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.

II. Protected Activity

In this case, Mr. Holloway does not identify a specific part of the Act or Regulations, or any other law, rule, or regulation that Respondent violated. Complainant alleged that he witnessed bathroom water being used in the production of Respondent’s products, and that he informed ownership that he would have to report Respondent for the perceived violation of health and safety standards. The Act provides that an employee engaged in protected activity if “they provided, caused to be provided, or is about to provide or cause to be provided to the employer . . . 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 if they “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). Therefore, there is no requirement that the Complainant allege a violation of any particular section of the law, but he must demonstrate that he reasonably believed the activity was a violation of the FSMA.

There is little evidence as to how Mr. Holloway reached a conclusion that the act of taking water from the bathroom and using it in the production process violated the FSMA. He testified that the issue with the bathroom water was “like the straw that broke the camel’s back”, and that it was as low as you can get. Complainant further stated that “I just thought you wouldn’t do that at home, just for obvious reasons, because of the chance of whatever’s on the floor and you’ve contaminated the bucket, and now you want to take the bucket out there, not to mention whatever’s in it.” Complainant also believed that it is a “commonsense kind of thing” to not serve individuals from the bathroom. Tr. 44. Eventually Complainant indicated that he felt that the incident with the bathroom was too much, “Too the point of what are you going to do, wait for someone to die or something and then I didn’t do anything.” *Id.*

Complainant also testified that there was a practice of altering formulas after they had been approved by quality control, and that he was reprimanded for not altering batch cards when instructed by Respondent’s owner. Complainant further stated that he witnessed products being poured from rusty cans into new containers that he believed would result in some of the rust remaining in the new container. Additionally, Complainant stated multiple times that he had witnessed mold in certain products, and Mr. Stone also testified that he had seen mold while working at the factory, but that he never saw moldy products being shipped out.

Respondent does not argue whether or not Complainant engaged in multiple instances of protected activity, but rather they consider Complainant’s March 24, 2014 complaint to OSHA to be the only relevant protected activity. *See Respondent’s Post-hearing Brief* at 4. This position, however, is contrary to their own statements where they acknowledged that Complainant gave Respondent verbal notice in February 2014 that he wanted to contact authorities with regard to the conditions at the plant. *Id.*

With respect to protected activity under the Act, Complainant need not establish that an actual violation occurred; his belief that a violation had occurred needed only be subjectively and objectively reasonable. After reviewing the evidence in the record, I find that Complainant reasonably believed that he had witnessed sanitary conditions that violated the FSMA, and that he informed Respondent that he would have to report the violations. The Respondent has offered little to no evidence to show the Complainant’s belief was unreasonable.⁶

III. Adverse Employment Action

Complainant generally characterized the adverse employment actions that he believes he suffered as “it’s send him home, we can’t use him, something to that effect, from Anil Sastry.” In his complaint to OSHA, Complainant alleged he received verbal reprimands, suspensions, a reduction in pay, and termination in retaliation for his concerns about his perceived food safety violations. Based on the complaint and the testimony at the hearing, the Complainant’s primary allegation of an adverse action is Respondent laying off Complainant in February of 2014 and being brought back at reduced pay.

⁶ In making this finding regarding protected activity, I do not opine on whether or not food safety violations occurred at Respondent.

Regarding Complainant's claim of being laid off in February of 2014, he stated in his OSHA complaint that on or about February 14, 2014, he informed Mr. Sastry of two issues. The first being that Complainant, "was being forced to put product in used drums that had not been cleaned." RX 1. The second was the unsanitary conditions at the plant and having to conceal those conditions. Complainant further stated in his complaint that "he had given up trying to persuade Mr. Sastry to change these conditions and would be reporting what was going on at the plant to OSHA and the Food and Drug Administration." *Id.* The complaint then indicates that on February 19, 2014, Complainant was terminated⁷ due to his opposition and reports of food safety violations. *Id.*

In their Position Statement, Respondent stated that Complainant produced a doctor's note on February 19, 2014, which indicated that Complainant had to be seated 90 percent of the time while working. RX 2. The Position Statement acknowledged that Complainant's sitting restriction had been in place since Complainant's surgery in August 2012. *Id.* The Position Statement further said that as a result of the February 19, 2014, doctor's note, Complainant was told to stay home while Respondent, "attempted to find a position where Mr. Holloway could be productive within the doctor's restrictions." *Id.* Towards the conclusion of the Position Statement, Respondent stated that, "rather than being threatened and disciplined as alleged by Mr. Holloway, Jogue went out of the way to find him a sitting job and his termination of employment was due to his injury and his own decision that he could not work", and also that Complainant was brought back to work at the same pay rate. *Id.* Thus, Respondent's position is that Complainant being off work for a few weeks starting February 19, 2014, was not an adverse employment action because they needed time to accommodate Complainant's work restriction, and they went out of their way to accommodate the restriction.

At the hearing, further information was provided regarding whether or not Complainant was terminated from his position in February of 2014. In their opening statement, counsel for Respondent stated that there was no unfavorable employment action taken against Complainant. Tr. 33. Counsel went on to say that Complainant's restrictions became more stringent in February of 2014, and that Respondent scrambled to find Complainant a 90 percent sitting job which they did in less than a month. *Id.* Counsel then stated that, "his layoff -- if you want to call it a layoff -- in February and March of 2014 was very brief." Tr. 34. Mr. Huber then testified as to whether or not Complainant was ever terminated. He stated that as of February 18, 2014, there was not a job available that could accommodate Complainant's restrictions because of the "ebbs and flows of the seasons" and also that Complainant was not doing what was needed to properly recover from the injury. Tr. 185. Mr. Huber also clarified that when Complainant came back to work in March of 2014, his hourly rate was reduced from \$11.00 to \$10.10. Tr. at 175.

In Respondent's post-hearing brief it states that Respondent never terminated Complainant's employment. *See Respondent's Post-hearing Brief* at 3. Respondent asserts that on February 19, 2014, Complainant produced a doctor's note that stated he must be seated 90 percent of the time, and Respondent then informed Complainant to stay home until they could

⁷ The circumstances surrounding Complainant being told he could not work due to the February 19, 2014 doctor's note, are described as termination and lay-off interchangeably throughout these proceedings. Complainant was not in fact terminated from employment at Respondent.

find a position that could accommodate the restriction. *Id.* at 4. Respondent here does not consider the few weeks Complainant was no longer working in February and March of 2014 to be an adverse employment action, nor do they acknowledge the decrease in wages when Complainant was hired back as an adverse employment action. *Id.*

Based on the entirety of the record, I find that Complainant suffered an adverse employment action, when Complainant was laid off from work in February of 2014. However Respondent would like to classify this time period, it is clear that Complainant was informed that he no longer had a position with Respondent, and was sent home without pay or the promise of future employment. I find that this is the equivalent to being laid off or suspended without pay.

IV. Contributing Factor

Complainant has the burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his suspension and firing. “A contributing factor is *any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. It just needs to be a factor; the protected activity need only play some role, and even an ‘insignificant’ or ‘insubstantial’ role suffices. If the ALJ believes that the protected activity and the employer’s non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.” *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030, at 11 (March 20, 2015) (internal citations omitted).

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 general⁸; 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).

⁸ 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).

The evidence in the record shows, and I have found, that Complainant was laid off from his position with Respondent following his conversation with Mr. Sastry in which he stated that he would have to report Respondent's unsanitary conditions to the proper authorities, i.e., the FDA. Although there is no direct evidence that Complainant's protected activity was a factor in being laid off, there is indirect evidence that demonstrates a causal relationship.

Looking first to Complainant's testimony, he stated his belief that being laid off in February of 2014 was due entirely to his protected activity. In his opening statement, Complainant stated that he was put out of the building under the pretense of his work restrictions, even though he had those same restrictions for two years prior. Tr. 32. Complainant went on to clarify in his direct examination stating that as a result of his conversation with Mr. Sastry, he was told that Respondent suddenly no longer had work for him. Tr. 45. Further, Complainant reemphasized that he was informed that he was being laid off due to Respondent's inability to accommodate his 90 percent sitting restriction, which Complainant again stated, "That has been the same verbatim restrictions I've had for about two years, to the letter, 90 percent of the time." *Id.*

Respondent, in their Position Statement, stated that "As a result of the doctor's note, Mr. Holloway was instructed to stay home while Jogue attempted to find a position where Mr. Holloway could be productive within the doctor's restrictions." RX 2. However, as was acknowledged above, this statement is contradicted by the sentence at the start of the same paragraph which said, "On February 19, 2014 Mr. Holloway produced a doctor's note which contained the *same restriction (must be seated 90% of the time) that had been in effect since Mr. Holloway's surgery.*" *Id.* (emphasis added). Additionally, on the previous page, Respondent states that in August of 2012, Complainant was placed on the 90 percent sitting restriction as a result of his surgery. *Id.*

Further, Respondent's Human resources manager also acknowledged that Complainant's restrictions had been in place prior to him submitting the work restriction on February 18, 2014. In his letter to Complainant, Mr. Huber stated, "On February 18, 2014, we *again* received a work limitation letter that reduces your ability to only sitting 90% of the work period. This work limitation *extends the previous work limitation* letter from the same or similar physician." RX 6 (emphasis added). Mr. Huber goes on to state that, "In August 2012, you were placed on work restriction from surgery from a pre-existing injury or condition. *You have been on a work limitation* from this previous health injury or health issue *since that time.*" *Id.* (emphasis added).

Additionally, Mr. Sastry informed Mr. Huber and Complainant's supervisor to send Complainant home, and directly acknowledged that Complainant had been under work restrictions for years. On February 19, 2014, Mr. Sastry emailed Mr. Huber and Complainant's supervisor regarding Complainant's February 18, 2014, doctor's note. CX L. Mr. Sastry wrote that Respondent could not use Complainant, and "Please send him home and let him know he can return after a doctor clears him to work." *Id.* On May 9, 2014, Mr. Sastry responded to Complainant's email regarding payment into Respondent's health plan. CX M. Mr. Sastry laid out a timeline of Complainant's history with Respondent and stated that Complainant, "reported

a preexisting injury to Jogue that required being seated 90% of the time.” *Id.* Mr. Sastry then wrote that the preexisting condition “had been in place for years”. *Id.*

The Position Statement, Mr. Huber’s letter to Complainant, and Mr. Sastry’s emails differ from statements given at the hearing. In the opening statement, counsel for Respondent indicated that in February of 2014, Complainant presented restrictions that were even more stringent than before and that because of these more stringent restrictions, “Jogue had to scramble in finding a job” to accommodate Complainant’s restrictions. Tr. 33. Additionally, when Mr. Huber testified at the hearing, he was asked about how Complainant’s February 18, 2014, restriction compared to his prior restrictions and stated that they were “similar, if not a little more restrictive.” Tr. 184.

Finally, in their post-hearing brief, Respondent argues that the only reason Complainant was sent home in February of 2014 was his 90 percent work restriction. They stated that “As a result of the doctor’s note, Mr. Holloway was instructed to stay home until Jogue could find a position that would accommodate the restriction.” See *Respondent’s Post-hearing Brief* at 4.

Accordingly, based on my review of the entirety of the evidence in the record, I find that Complainant’s protected activity was a contributing factor in Respondent’s decision to lay off Complainant in February of 2014. The evidence demonstrates that Respondent was aware of Complainant’s 90 percent sitting restriction prior to Complainant submitting his February 18, 2014, doctor’s note. This is evidenced by the language in Respondent’s Position Statement, Mr. Sastry’s May 9, 2014 email, and further in Mr. Huber’s letter to Complainant which was sent one week after Complainant submitted his February 2014 work restrictions. RX 6. Therefore, Respondent was either not accommodating Complainant’s restriction for 18 months and decided in February of 2014 to find Complainant a sitting job for the first time, or they used the February 18, 2014, restriction as pretext for laying off Complainant. The evidence demonstrates that Respondent used Complainant’s restriction as pretext, and I subsequently infer that Complainant’s protected activity tended to affect the decision to lay Complainant off. Additionally, the temporal proximity of Complainant informing Mr. Sastry on February 14, 2014, followed by him being laid off five days later, also supports my finding that Complainant’s protected activity was a contributing factor in his adverse employment action.

V. *Adverse Action in the Absence of Protected Activity*

Notwithstanding Complainant’s meeting the initial burden of proof by a preponderance of evidence, I must determine whether the Respondent showed by clear and convincing evidence that it would have taken the same action absent Complainant’s protected acts. This “clear and convincing” evidence standard:

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).

As stated earlier, Respondent chiefly argues that Complainant cannot demonstrate that an adverse action took place because they did not have a job to accommodate Complainant’s 90 percent sitting restriction. Respondent bases their argument on statements that Complainant’s restrictions submitted in February of 2014 were new and more stringent than previous restrictions. Given the fact that Respondent argues that the only reason in which Complainant was laid off on February 19, 2014, was because of his “new” work restriction, which I have determined to be pretext, I find that Respondent has not demonstrated any alternative reason to laying off Complainant. Therefore, Respondent has failed to show by clear and convincing evidence that it would have laid off Complainant absent his protected activity.

VI. Damages

Looking now to Complainant’s request for damages, Complainant listed three forms of relief:

- A. Reinstatement with full seniority (or, alternatively, front pay), back pay and interest;
- B. Compensation for any special damages suffered; and
- C. Litigation costs, expert witness fees, and reasonable attorney fees.”

RX 1.

Because I determined that the only adverse action taken against Complainant was being laid off in February of 2014 and his reduction in pay when he returned to work, I find that the appropriate relief to be back pay for the time Complainant was home without pay plus the difference in his hourly rate for the time he was back at work, prior to his slip and fall.

Calculation of back pay must be reasonable and based on the evidence. However, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 1995-STA-43, slip op. at 11, n.12 (Sec’y May 1, 1996). Any uncertainty concerning the amount of back pay should be resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, 1990-STA-37 (Sec’y June 3, 1994); *Kovas v. Morin Transport, Inc.*, 1992-STA-41 (Sec’y Oct. 1, 1993). According to my calculations, Complainant was out of work from February 19, 2014, until he returned on March 17, 2014. Assuming a five-day work week with eight-hour workdays, Complainant would have been without pay for 18 work days or 144 work hours. This equates to back pay of \$1,584.00 for the time Complainant was not working. Additionally, Mr. Huber testified at the hearing that Complainant had his hourly rate reduced from \$11.00 per hour to \$10.10 per hour when he returned to work after he was laid off. Since Complainant worked five days from March 17, 2014, to March 22, 2014, and assuming 40 hours

of work over the five days, Complainant is entitled to \$36 in back pay to compensate for the difference in his hourly wages.

Although Complainant requested reinstatement with full seniority, I find that this form of relief is not appropriate given the fact that Complainant was not terminated on March 22, 2014, but rather suffered a slip and fall and never returned to work. The record indicates, and Complainant testified, that he had not been back to work for Respondent, and he conceded that he had not been terminated from Respondent. Complainant further stated that he was receiving social security disability benefits because of the slip and fall, and would currently be unable to return to work due to the injury.

VII. Attorney Fees

Finally, as a prevailing party, Complainant is entitled to recover litigation costs and expenses.⁹ An itemization of such costs and expenses, including supporting documentation, must be submitted by Complainant to Respondent within thirty days from the date of this Order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant. The parties shall confer before presenting me with the documents.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED**, that:

1. Respondent shall pay Complainant back pay in the amount of \$1,620.00 with interest.
2. Complainant shall have 30 days from the date of this Decision to file a petition for costs and expenses.

SO ORDERED.

CARRIE BLAND
District Chief Administrative Law Judge

Washington, D.C.

⁹ However, as Complainant appeared pro se, attorney fees are not available.

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, 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).