



Issue Date: 06 January 2017

Case No.: 2016-FDA-00003

In the Matter of:

CRAIG WATTS,
Complainant,

v.

PERDUE FARMS, INC.,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION**

This matter arises from a complaint filed under the employee protection provisions of the Food Safety and Modernization Act ("FSMA"), 21 U.S.C. § 399d (2011), which amended the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.* (1938), and is governed by the implementing regulations found in the Code of Federal Regulations, Title 29, Part 1987.

Summary

Mr. Craig Watts ("Complainant") is the owner of C&A Farms in Fairmont, North Carolina. *See* Complainant Craig Watts' Opposition to Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction and response at 5 (hereinafter *Complainant's Resp.*). Complainant alleges he had an independent contractor relationship with Perdue Farms, Inc., ("Respondent") in which he would "grow out" chickens until their removal and processing by Respondent.¹ *See* Respondent Perdue Farms, Inc., Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4 (hereinafter *Respondent's Motion to Dismiss*). In 2014, Complainant alleged that consumers were being misled by the Respondent on the farming practices and health of chickens that were raised for Respondent in violation of the Food Safety Modernization Act and the Food, Drug, and Cosmetics Act. *Complainant's Resp.* at 6. In response to this allegation, Complainant alleges Respondent took actions in retaliation against Complainant which violated the employee

¹ Mr. Watts' relationship with Perdue Farms, Inc. in their contractual agreement allegedly allowed him to raise chickens that Perdue delivered for a number of weeks until they would be removed from his farm and harvested by Perdue. Complainant alleges that during this "grow out" period, he noticed discrepancies between the quality of chickens being raised and the claims made by Respondent. The court cites to *Bunting v. Perdue, Inc.*, 611 F. Supp. 682, 683-85 (E.D.N.C. 1985); *Respondent's Motion. to Dismiss* at 4-5; *Complainant's Resp.* at 5-7 (providing background regarding the relationship between Respondent and Complainant and the chicken raising operation).

protection provisions of the Food Safety Modernization Act. 21 U.S.C. 399d. Complainant filed this claim alleging that Respondent violated Section 399d by retaliating against him for exposing above alleged violations. *Complainant's Resp.* at 7. Based on the law discussed below, this court finds it does not have subject matter jurisdiction over Complainant's claims, cannot hear the claim, and cannot weigh the merits of the claim. The court grants Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Procedural History

On February 19, 2015, Complainant filed a whistleblower retaliation complaint with the United States Department of Labor, Occupational Safety and Health Administration (OSHA), alleging violations of the employee protection provisions of the Food Safety Modernization Act. *Complainant's Resp.* at 7. On February 8, 2016, OSHA issued a finding and determination that Perdue was covered by FSMA provisions but that Complainant was not an employee under the FSMA. *Id.* at 8. On March 18, 2016, Complainant filed his Request for Hearing and Objections to Order challenging OSHA's decision and requested a hearing before an Administrative Law Judge pursuant to 29 C.F.R. Part 1987.106(a). *See* Request for Hearing and Objections to Order. The case was assigned to the Honorable Dana Rosen on March 31, 2016. *See* Notice of Assignment. Shortly thereafter, the Parties made a joint request to stay discovery pending the resolution of Respondent's planned Motion To Dismiss on jurisdictional grounds. *See* Joint Request to Stay Discovery Pending Resolution of Motion to Dismiss and for a Scheduling Conference. On April 26, 2016, an Order granting the joint request was issued. *See* Order Granting Joint Request to Stay Discovery Pending Resolution of Motion to Dismiss. A requested extension of time for the Complainant's reply brief was granted on July 1, 2016. *See* Order Granting Extension of Time to Respond to Respondent's Motion to Dismiss. On July 22, 2016, U.S. Poultry and Egg Association filed a Motion in Support for Leave to File an Amicus Brief in Support of Respondent Perdue Farms' Motion to Dismiss for Lack of Subject Matter Jurisdiction. This motion was granted on August 4, 2016. *See* Order Granting Leave to File an Amicus Brief in Support of Respondent Perdue Farms' Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Parties filed briefs, all were considered, and applicable case law, statutes and regulations were applied to the claim at hand.

Jurisdiction

Respondent asserts a jurisdictional challenge and claims that the United States Department of Labor and therefore the Office of Administrative Law Judges lack subject matter jurisdiction over the Complainant's claims. *Respondent's Motion to Dismiss* at 7-9. Respondent argues that the United States Department of Agriculture, not the United States Food and Drug Administration, is the statutory body empowered to hear and to enforce claims arising under the Poultry Products Inspection Act ("PPIA"). *See* 21 U.S.C. § 467f; *Respondent's Motion to Dismiss* at 7.

Complainant argues that the statutory provision exempting poultry and poultry products from the provisions of the FDCA also removes on-farm poultry products from the jurisdiction and whistleblower provisions found within the FSMA. 21 U.S.C. § 467f (stating that "[p]oultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 *et seq.*] to the extent of the application or extension thereto of the

provisions of this Act [21 USCS §§ 451 *et seq.*], except that the provisions of this Act [21 USCS §§ 451 *et seq.*] shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 *et seq.*] prior to enactment of the Wholesome Poultry Products Act [enacted Aug. 18, 1968].”) This would then remove poultry from the regulatory jurisdiction of the FDCA and make 21 U.S.C. § 399d, the employee protection provision granting Occupational Safety and Health Administration (“OSHA”) power to review FSMA whistleblower claims, inapplicable to poultry and poultry products that are exempted from the FDCA by the PPIA. For the reasons stated below, this court finds that it does not have subject matter jurisdiction to adjudicate Complainant’s claim.

Applicable Law

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found in 29 C.F.R., Part 18, provide the standard to be applied on a Motion for Dispositive Action. *See* 29 C.F.R. 18.70. A party may make a motion to dismiss “part or all of the matter for reasons recognized under controlling law, such as *lack of subject matter jurisdiction*, failure to state a claim upon which relief can be granted, or untimeliness.” *Id.* at (a). If there is a situation not covered by “these rules, or a governing statute, regulation, or executive order” the Federal Rules of Civil Procedure apply. *See* 29 C.F.R. § 18.10; *see also Ahluwalia v. ABB, Inc.*, 2007-SOX-44, *1, *2 (ARB Sept. 24, 2007) (for application of pre-2015 amendment 29 C.F.R. § 18.1, which mirrors the language found in 18.10). An administrative law judge must dismiss the matter once they make a determination that subject matter jurisdiction is lacking. 29 C.F.R. § 18.70(a).

Subject matter jurisdiction “refers to a tribunal’s power to hear a case.” *Snyder v. Bechtel Int’l Oil, Gas, & Chem.*, ALJ Case No. 2015-CPS-00004 (2015) (quoting *Morrison v. Nat’l Australian Bank*, 561 U.S. 267 (2010)). “The Department of Labor’s subject matter is invoked ‘when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is obviously not frivolous.’ ” *Snyder*, 2015-CPS-00004 at 10 (quoting *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-007, slip op. at 3 (ARB Aug. 31, 2000)). Under the analogous Federal Rule of Civil Procedure 12(b)(1) and controlling law as incorporated by 29 C.F.R. 18.70(a), the Complainant bears the burden of proof in asserting that the court’s jurisdiction is proper. *Ahluwalia*, 2007-SOX-44 at 2; *see also* 29 C.F.R. 18.70(a).

Respondent’s Motion to Dismiss for Lack of Subject Matter Jurisdiction

Respondent argues that the U.S. Department of Labor, Office Of Administrative Law Judges, lacks authority to hear the Complainant’s claim. Respondent makes two different, but interlinked, challenges to the authority of this court to review the Complainant’s FSMA whistleblower claim. First, Respondent alleges that OSHA’s conclusion that they retained jurisdiction over Complainant’s FSMA whistleblower claim was in error because “poultry raising practices” are expressly exempt from the FDA’s regulatory authority by the exemption provision found within the PPIA and instead under the purview of the United States Department of Agriculture (“USDA”). *See Respondent’s Mtn. to Dismiss* at 7; *see, e.g.*, 21 U.S.C. § 467f. Second, Respondent asserts that Complainant’s claim should be dismissed on the independent legal ground that the FDA does not have authority to regulate the on-farm activities which are

central to the complaint and that the USDA and their Food Safety Inspection Service (“FSIS”) retains authority over on-farm activities. *Id.*

Complainant’s Response to Respondent’s Motion to Dismiss

In Complainant’s Opposition and response to Respondent’s Motion to Dismiss, Complainant argues that the United States Department of Labor has jurisdiction over cases filed pursuant to the employee protection provision of the Food Safety Modernization Act. (FSMA) Complainant argues that there is subject matter jurisdiction because Respondent is “a company engaged ‘the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food.’ ” Complainant argues that the U. S. Department of Labor’s jurisdiction is proper because the FDCA prohibits companies from selling “ ‘food’ that has been ‘adulterated’ . . . or ‘food’ that has been ‘misbranded.’ ” *Complainant’s Resp.* at 13; 21 U.S.C. §§ 331(c), 342(a)(4), 343(a). Complainant argues that previous cases have interpreted the term “food” broadly and include regulation of livestock which is to be slaughtered and adulteration of livestock through misadministration of livestock drugs. *Complainant’s Resp.* at 13; *see also United States v. Rhody Dairy*, 812 F. Supp. 2d. 1239 (W.D. Wash. 2011); *United States v. Tuente Livestock*, 888 F. Supp. 1416 (D. Ohio 1995). Complainant further asserts that the FDA and USDA exercise concurrent jurisdiction over meat and poultry products “beyond the point when such products leave a USDA inspected establishment.” *Complainant’s Resp.* at 14. Complainant also asserts that even if the FDA lacks jurisdiction over Complainant’s disclosures because of the PPIA, the U. S. Department of Labor still retains jurisdiction to review the Complainant’s FSMA whistleblower claim. *Id.* at 15.

Statutory Authority Analysis

The FSMA, signed into law on January 4, 2011, was passed as a reform of United States food safety laws and amended portions of the FDCA in an attempt to modernize food safety regulations promulgated by the FDA. Food Safety Modernization Act, 111 P.L. 353, 124 Stat. 3885 (2011). The FSMA provides that “[n]othing in this Act, or an amendment made by this act, shall be construed to – alter or limit the authority of the Secretary of Agriculture under the laws administered by such Secretary, including – (B) the Poultry Products Inspection Act....” 21 U.S.C. § 2251. The FSMA also added employee protection provisions to the preexisting FDCA which protect employees from retaliation by certain classes of employer upon good faith reporting of an alleged violation of the provisions of the FDCA. 21 U.S.C. § 399d. The employee protection provisions found within the FSMA specify that a party may report retaliation by filing a complaint with the Secretary of Labor within 180 days of the violation. 21 Id. § (d)(b). The FDCA covers a large portion of the food production and distribution system within the United States, but certain classes of “food” are regulated by other agencies, such as poultry and meat which are primarily regulated under the jurisdiction of the USDA.² *See generally* Federal Meat

² Note: “Food” itself is a contested term in this action. The FDCA in 21 U.S.C. § 321 defines “food” as (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article. Complainant avers that “food” includes live animals such as cows and swine, so by association poultry are included. *Complainant’s Resp.* at 13 (citing *Rhody Dairy*, 821 F. Supp. at 1239; *Tuente Livestock*, 888 F. Supp. at 1424). Respondent asserts that “food” does not include live poultry. *Respondent’s Mtn. to Dismiss* at 15-16. As it is not necessary to make a determination on the contention that chickens are food because of the clear preemption of the PPIA, for the purposes of resolving the question of subject matter jurisdiction, this court does not make a finding on the matter.

Inspection Act, 21 U.S.C. §§ 601-695; Renée Johnson, Cong. Research Serv., *The Federal Food Safety System: A Primer*, at 1, 2-8 (Jan. 17, 2014), <http://fas.org/sgp/crs/misc/RS22600.pdf>. While the FDA retains control over adulteration of most food through the FDCA, there are limits. *See, e.g.*, 21 U.S.C. § 350(c)(a) (holding that the Secretary of Health and Human Services may compel access to and copy all records related to adulterated articles of food with an exception for farms and restaurants). The PPIA contains an express provision exempting “poultry and poultry products” from the provisions of the FDCA but not derogating any authority conferred by the FDCA prior to the enactment of the Wholesome Poultry Products Act in 1968. *See* 21 U.S.C. § 467f.

The PPIA was enacted in 1968 to protect the public from “unwholesome, adulterated, or misbranded” poultry³ products. *See* Poultry Products Inspection Act, 21 U.S.C. §§ 451-472 (1957). The PPIA gave authority to the Secretary of Agriculture to enforce the provisions of the Act, which regulate, but are not limited to, slaughter, labelling, and recordkeeping provisions of poultry production. *Id.* § 467(d). This included granting the USDA and FSIS authority to conduct *ante mortem* and *post mortem* of poultry in official establishments. *Id.* § 455. The PPIA provides its own provision for persons arbitrating disputed violations and permits persons an “opportunity to present [their] views orally or in writing with regard” to further proceedings. *Id.* § 462. Section 467f exempts the PPIA from the provisions of the FDCA to the “extent of the application or extension thereto of the provisions of [the PPIA]” except for authority derogated to the FDCA before the enactment of the Wholesome Poultry Products Act in 1968. *Id.* § 467f. Additionally, the USDA uses the authority of the PPIA to run a label approval system which certifies certain animal claims and qualities. *See generally* 9 C.F.R. § 381.129; *Prior Label Approval System: Generic Label Approval*, 78 Fed. Reg. 66,826 (Nov. 13, 2013). In certain scenarios, the FDA and USDA’s jurisdiction may overlap. *See* CPG 565.100, FDA Jurisdiction Over Meat and Poultry Products, FOOD & DRUG ADMIN. (Nov. 29, 2011) (stating that it is FDA policy to inform USDA FSIS when an apparent violation has occurred involving a meat or poultry product that has left a USDA inspected establishment and that the FDA will not normally initiate action unless the USDA does not wish to handle it).

Findings of Fact and Conclusions of Law

This court begins its analysis with Respondent’s argument that the court lacks subject matter jurisdiction to hear Complainant’s claim. Respondent argues that under the PPIA, the U. S. Department of Agriculture (USDA) is the federal agency with authority to regulate alleged adulteration and misbranding of poultry products from on- farm conditions similar to those alleged by Complainant. Respondent argues that the U. S. Department of Labor does not have authority.

Complainant filed his claim pursuant to the employee protection provisions of the FSMA, which allows a party who reported their reasonable belief of an act or omission which would constitute a violation of the FDCA and:

[W]ho believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on

³ Within the PPIA, “poultry” are defined as “any domesticated bird, whether live or dead.” 21 U.S.C. 453(e).

which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor (referred to in this section as the "Secretary") alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

21 U.S.C. 399d(b).

Complainant alleges that after he reported what he reasonably believed to be a violation of the FDCA, the U. S. Department of Labor has the statutory authority to hear his claim. *Complainant's Resp.* at 3-4. Conversely, Respondent argues that the U. S. Department of Labor does not have statutory authority to hear this claim. Respondent calls jurisdiction into question by questioning the statutory interplay between the provisions of the FSMA and the operation of the PPIA. *Respondent's Motion to Dismiss* at 7. The Respondent argues that PPIA excludes the rearing of poultry and poultry products from the FDCA and by implication, the employee protection provisions of FSMA. Respondent argues that, therefore, the U. S. Department of Labor has no subject matter jurisdiction to adjudicate Complainant's claim.

Complainant asserts that he has been raising chickens on his farm for 23 years, 22 of which have been for the Respondent. *Complainant's Resp.* at 5. Complainant states that under a contractual obligation, Complainant receives chicks from Respondent and raises them until they are retrieved by Respondent for slaughter and processing. *Id.* Based on the Parties' pleadings, it appears that Complainant and Respondent are reasonably classified as being involved in the raising of poultry, with Respondent additionally involved in the labelling, processing, and shipping of poultry products. *Complainant's Response* at 5-7; *Respondent's Motion to Dismiss* at 1-2, 4-7.

Complainant argues that even if the PPIA is the exclusive regulatory source for remedying claims involving adulterated or misbranded poultry products, the U. S. Department of Labor retains subject matter jurisdiction over his whistleblower claim because he made a non-frivolous allegation that he believed the Respondent was violating the FSMA. *Complainant's Resp.* at 4. In support of this argument, Complainant cites *Sylvester v. Paraxel Int'l*, ARB No. 07-123 (ARB 2011) and *Johnson v. Wellpoint Companies, Inc.*, ARB No. 11-035 (ARB 2013).⁴ *Complainant's Resp.* at 4. In *Sylvester*, the Complainant appealed an ALJ's decision to dismiss her Sarbanes-Oxley Act ("SOX") whistleblower claim. The Respondent challenged the jurisdiction of the U. S. Department of Labor stating that the allegations failed to meet the prescribed subject matter jurisdiction granted by Congress. *Id.* The Administrative Law Judge determined that the U.S. Department of Labor lacked subject matter jurisdiction because the Complainant failed to articulate a definitive and specific violation of law covered by SOX § 806 or other violations. *Sylvester*, ARB No. 11-035, at 7. The Administrative Review Board reversed, holding that in that case, the ALJ had subject matter jurisdiction to hear the case by an explicit grant of authority from the Secretary of Labor under 18 U.S.C. §1514(A)(b). *Id.* at 11.

⁴ *Johnson v. Wellpoint* is not relevant to the case here. *Johnson* does not address subject matter jurisdiction.

In the case here, unlike in *Sylvester*, the specific grant of authority for the U. S. Department of Labor to review FSMA whistleblower cases in 21 U.S.C. § 399d only applies to violations of the FDCA and FSMA (21 U.S.C. § 301 *et seq.*). The express language of the PPIA, signed into law in 2011, removes the authority from the U. S. Department of Labor by stating that “[p]oultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 *et seq.*] to the extent of the application or extension thereto of the provisions of this Act...” 21 U.S.C. § 467f. As the PPIA was signed in 2011, it cannot fall into the prior conveyance of authority given to the FDCA before 1968. *Id.* An alternative reading would render § 467f internally inconsistent when read against the rest of the statute, including 21 U.S.C. § 2251. *See generally Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (stating that “[o]ur first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.”); 156 Cong. Rec. H8861-01 (2010) (discussing implication and implementation of FSMA).

Supporting that Congress intended the USDA to retain jurisdiction over certain poultry claims with the PPIA, the exemption clause of the Federal Meat Inspection Act (“FMIA”) has been interpreted to work in a similar manner. The exemption provision of the FMIA provides that “[n]otwithstanding any other provisions of law, including section 1002(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 392(a)), the provisions of this Act [21 USCS §§ 601 *et seq.*] shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 301 *et seq.*] prior to enactment of the Wholesome Meat Act [enacted Dec. 15, 1967].” *See* 21 U.S.C. § 679. In a compliance policy guide promulgated by the Food and Drug Administration, the agency notes that:

With respect to adulteration and misbranding, Section 902(b) of the Federal Food, Drug, and Cosmetic Act states that meat and meat products are exempt to the extent they are covered by the Meat Inspection Act. This had been construed since 1938 as meaning that USDA has exclusive jurisdiction up to the time a meat or meat product leaves a USDA inspected plant... POLICY: FDA will inform USDA Food Safety and Inspection Service (FSIS) when an apparent violation is encountered involving a meat or poultry product that has left a USDA inspected establishment.

CPG Sec. 565.100, FDA Jurisdiction Over Meat and Poultry Products, FOOD & DRUG ADMIN. (last updated Mar. 2005).

This policy, while predating the FSMA and only explicitly addressing the FMIA, supports that the FDA does recognize that certain meat or poultry production activities are under USDA jurisdiction up to the point they leave the farm or processor by virtue of specific statutory authority. While there are limited exceptions to this policy, such as the ability to exercise jurisdiction over meat and poultry products in interstate commerce when appropriate or when the USDA chooses not to become involved, the policy supports that the exemption clause found in the FMIA does affect the control of the FDCA over meat and livestock regulation. *Id.* In Complainant’s case, the allegations made involve a violation of the FDCA for on-farm and processor activities. *See Complainant’s Resp.* at 6 (discussing the alleged “cramped and infectious conditions in Perdue poultry houses” and that consumers were allegedly being fed

misinformation about their food in violation of the FDCA and FSMA). These alleged activities took place on the Complainant's farm and at the Perdue processing facility. *Respondent's Mtn. to Dismiss* at 4. These locations are regulated by the USDA. *See* Packers and Stockyard Act, 1921 § 1, 7 U.S.C. § 181 (1921); 21 U.S.C. §§ 451-472. At the time Complainant made his allegations, the chickens were not products that had left a "USDA inspected establishment." *Complainant's Resp.* at 5-6. As the FSMA makes explicit provisions for the adulteration and mislabeling of poultry, the Complainant's utilization of the employee protection provision does not allege violation under the FDCA, but under the PPIA. *See* 21 U.S.C. §§ 453, 458-459. Further, as this incident is alleged to have occurred on the farm and at the processor, this violation did not occur at a time where concurrent jurisdiction exists. *See* CPG Sec. 565.100, FDA Jurisdiction Over Meat and Poultry Products.

The FSMA, as a 2011 amendment to the FDCA, removed almost all authority for poultry and poultry claims from the FDCA except in cases where the authority was conferred "prior to enactment of the Wholesome Poultry Products Act [enacted Aug. 18, 1968]." 21 U.S.C. § 467f. As the employee protection provisions of the FSMA were enacted in 2011, this authority was not conferred to the FDCA under the plain reading of the statute. 21 U.S.C. § 399d. In light of the Congressional intent in passing the PPIA, the statutory preemption clause found in PPIA (21 U.S.C. 467f) which removes most of the regulatory structure protecting poultry and poultry products from the FDCA, and that the alleged claim falls in line with the prohibited conduct of the PPIA, this court finds that it lacks subject matter jurisdiction to review Complainant's claims. Complainant's claim alleges not a violation of the FDCA, but an alleged violation of the PPIA. Additionally, even if concurrent regulatory jurisdiction between the FDA and USDA is proper in certain circumstances, Complainant's alleged violations of the FDCA occurred on the farm and at the processor, both places protected and regulated under the PPIA. *Complainant's Resp.* at 6.

Conclusion

Based on the case law, Congressional intent, and the statutes, the U. S. Department of Labor does not have jurisdiction to hear this FDA claim, submitted to OSHA. The proper forum for consideration of this claim is through the U. S. Department of Agriculture under the PPIA.

As Complainant's claim for alleged retaliatory discrimination under 399d does not allege an action under the FDCA due to the statutory preemption of the PPIA, there is no jurisdiction under the employee protection provisions of the FSMA. The FSMA, as a 2011 amendment to the FDCA, is not within the regulatory authority of the FDCA retained before the enactment of the Wholesome Poultry Products Act. 21 U.S.C. 467f. Additionally, while Complainant argues that at some point in the poultry raising process both the FDCA and USDA may exercise concurrent jurisdiction over poultry and poultry products, the violations alleged by Complainant are directly addressed by the PPIA and took place before leaving a USDA inspected establishment. *Complainant's Resp.* at 6.

For these reasons, the court finds it has no authority to hear this case. The court finds it has no subject matter jurisdiction over Complainant's claims. The court is not statutorily authorized to hear allegations of disputes arising under the PPIA. The employee protection provisions of the FSMA, which it is empowered to adjudicate, do not cover the poultry raising allegations made by the Complainant. *Snyder*, 2015-CPS-00004 at 10.

The court has no authority to address the merits or weigh the credibility of Complainant's claim.

Accordingly, the court cannot hear the Complainant's claim, grants Respondent's Motion To Dismiss, and dismisses Complainant's Complaint for lack of subject matter jurisdiction pursuant to 29 C.F.R. 18.70(a).

ORDER

It is hereby **ORDERED** that:

The Respondent Perdue Farms' Motion to Dismiss the Complainant's Claim for lack of subject matter jurisdiction is **GRANTED**.

SO ORDERED.

DANA ROSEN
Administrative Law Judge

DR/TR/mjw
Newport News, VA

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).