

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 27 October 2017**

**Case Number: 2017-FDA-00009**

*In the Matter of:*

**KENNETH HERUBIN,**  
*Complainant*

v.

**KELLOGG COMPANY,**  
*Respondent.*

**Marlo D. Bruch, Esq.**  
**Kalamazoo, Michigan**  
**For the Complainant**

**Donald P. Lawless, Esq.**  
**Grand Rapids, Michigan**  
**For the Respondent**

**Before: Stephen R. Henley**  
**Chief Administrative Law Judge**

**DECISION AND ORDER LIFTING STAY**  
**AND DISMISSING COMPLAINT**

This matter arises under Section 402 of the Food Safety Modernization Act (“FSMA”), 21 U.S.C. § 399d, and the regulations at 29 C.F.R. Part 1987. On October 10, 2016, Kenneth Herubin (“Complainant”) filed a formal complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), alleging that Kellogg Company (“Respondent”) violated the FSMA by retaliating against him for voicing food safety concerns. On July 21, 2017, the Secretary of Labor, acting through the Regional Administrator for OSHA, Chicago Regional Office, issued findings dismissing the complaint. On July 31, 2017, Complainant, through counsel, filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“Office”). It is not yet scheduled for hearing.

On August 23, 2017, Respondent filed a *Joint Motion to Stay Proceedings Pending Facilitative Mediation*. Respondent explained that the parties had agreed to participate in a

facilitative mediation on October 9, 2017 and requested a stay in the proceedings. Accordingly, on August 28, 2017, I issued a *Notice of Assignment and Order Staying Proceedings*, requiring that the parties provide status updates every 60 days, with the first due October 31, 2017.

On October 20, 2017, Respondent's counsel filed a *Stipulation and Joint Motion to Dismiss with Prejudice* ("Motion") requesting that, "as all matters in controversy between the Claimant and Employer hav[e] been resolved," the proceedings in this matter be dismissed with prejudice. The Motion is signed by Complainant, his attorney, and Respondent's counsel. The parties attached no other documentation to the Motion.

Upon good cause shown, the Motion is GRANTED.<sup>1</sup> The *Order Staying Proceedings* is lifted. The above captioned matter is hereby DISMISSED with prejudice, without costs awarded to either party.

SO ORDERED.

STEPHEN R. HENLEY  
Chief Administrative Law Judge

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<sup>1</sup> A party may terminate a FSMA case pending before this Office before the ALJ issues a determination on the merits by withdrawing objections to OSHA's findings or by settling the case and obtaining approval of the settlement agreement by the ALJ. 29 C.F.R. §§ 1987.111(c), (d)(2). If the Complainant here intended to withdraw his objections to OSHA's findings, he has not expressly done so. Instead, the parties' *Stipulation and Joint Motion to Dismiss* uses language "having resolved all matters in controversy," and "the parties jointly move for and request ... the proceedings be dismissed with prejudice," suggesting that the parties have in fact entered into a settlement agreement. As the parties did not provide this tribunal with a copy of a settlement agreement for review and approval, I have not had the opportunity to determine whether any such agreement reached by the parties constitutes a fair, adequate and reasonable settlement of the underlying FSMA complaint. *Uhley v. William F. Braun Milk Hauling, Inc.*, ARB No. 12-082, ALJ No. 2011-STA-33 (ARB Nov. 22, 2013). Normally, I would issue an order requesting the parties clarify their intent. However, as Complainant signed the joint stipulation and both parties are represented by counsel, who aver that the matters in controversy between the Complainant and the Employer have been resolved, and request the matter be dismissed with prejudice, I will do so. That said, the court's dismissal of this matter should not be interpreted as approval of any settlement agreement reached by the parties. As such, any unapproved settlement agreement might not be subject to judicial enforcement. *See* 29 C.F.R. 1987.111(e). If the parties intended otherwise, a motion for reconsideration of this decision and order should be filed no later than ten days after service, with a copy of any signed and executed settlement agreement. 29 C.F.R. § 18.93.