



**Issue Date: 01 March 2018**

CASE No.: 2018-FDA-00001

In the Matter of:

K.C. KNOKE,

Complainant,

v.

FERRARO FOODS OF NORTH CAROLINA, LLC,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

This case arises out of a complaint filed on May 10, 2016, under the FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d and the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. §1514A.

Complainant alleged an adverse action occurred on April 18, 2016. Complainant alleged that he was terminated in retaliation for reporting food sale and packaging safety violations. Respondent stated that he was terminated during his probationary 90 day period, when he did not follow company procedures for disciplinary actions, terminations, performance evaluations, staffing, and salary increases. The Secretary found Complainant would have been terminated regardless of any protected activity.

The issue in the Summary Decision is the issue of whether Complainant timely filed his appeal and request for hearing and whether he complied with the Secretary's Findings and Regulations in filing same.

**PROCEDURAL HISTORY**

A Final Determination letter was issued by the Occupational Safety And Health Administration (OSHA) on October 5, 2017. In the Secretary's Findings, OSHA determined that the "there is no reasonable cause to believe that Respondent violated FSMA...."

In the Secretary's Findings, it was found that Complainant was terminated on April 18, 2016, he filed a complaint with the Secretary Of Labor on May 10, 2016 alleging retaliation in violation of FSMA, and that the complaint was timely filed within 180 days of the alleged adverse action. Per the Secretary's Findings, Respondent is an entity engaged in processing food within 21 USC section 399d (a). Complainant was the General Manager at Respondent's North Carolina facility such that he was covered by FSMA. Per the Secretary's Findings, Complainant refused to sell certain food products on March 29, 2016, and repackaged product on April 4 and/or April 11, 2016.

Per the Secretary's Findings, Complainant was terminated on April 18, 2016. Respondent asserted that "Complainant was discharged during his introductory period within the first 90 days." He was terminated "for failure to communicate with management regarding staffing decisions, not following company procedures to properly document disciplinary actions, terminations, performance evaluations and salary increases. Respondent acknowledges Complainant wrote 3 emails regarding the disposal of improperly stored turkey. This followed Respondent's procedures and no discipline occurred. Respondent denies ordering Complainant to sell outdated products, and denies FSMA violations. Respondent denies Complainant engaged in protected activity but asserts that if Complainant did engage in FSMA protected activity, Respondent would have terminated the Complainant regardless of any protected activity."

On March 22, 2016, Respondent sent its Employee Review Procedure by email to Complainant. This was to clarify the review procedures that included pay increases for staff.

On March 29, 2016, Complainant responded by email to the email regarding review procedures, employee evaluations, and salary. "On April 11, 2016, Complainant terminated the second shift warehouse manager at the Mebane [North Carolina] facility without coordination or approval from Respondent."

On April 12, 2016, Complainant and Respondent's VP Dean Barcelona discussed promoting a supervisor to warehouse manager with a 37% salary increase. Per the Secretary's Findings, Respondent stated that "Mr. Barcelona specifically instructed Mr. Knoke that such an increase was not possible, and that the Company could justify an increase of only half that amount."

On April 14, 2016, Complainant sent an email to Respondent's corporate human resources. It included a Personnel Action Form "for the 37% salary increase for the new second shift warehouse manager."

On April 18, 2016, Complainant was terminated. Respondent stated he was "discharged during introductory period within 90 days. Failure to communicate with management regarding staffing decisions. Not following company procedures to properly document disciplinary actions, terminations, performance evaluations and salary increases."

The Secretary found that based on the evidence, Complainant was terminated “for a legitimate, nondiscriminatory reason.” The Secretary stated that “in the ordinary course of the employee’s duties,” Complainant engaged in protected activity on both March 29, 2016 and April 4, 2016. The Secretary found that Respondent had knowledge of the March 29, 2016 protected activity only. The Secretary concluded that, “There is no reasonable cause to believe that the protected activity contributed to the adverse action on April 18, 2016. Respondent has proven by clear and convincing evidence that it would have terminated Complainant regardless of the protected activity.”

Accordingly, Complainant’s complaint was dismissed.

In the Secretary’s Findings mailed to Complainant, he was advised of his right to file objections within 30 days. He was advised that “objections **must** be filed in writing with” the Chief Administrative Law Judge, U. S. Department of Labor, Office Of Administrative Law Judges, “With copies to: Travis W. Vance, Fisher & Phillips,” Respondent’s attorney. (Emphasis added).

On October 13, 2017 and received on October 20, 2017, Complainant filed his detailed objections and request for a hearing before the Office Of Administrative Law Judges. It was sent to the Chief Administrative Law Judge, U.S. Department of Labor, Office Of Administrative Law Judges in Washington, D.C. No service sheet was attached and no addresses for individuals also served were included.

On December 5, 2017, a Notice Of Docketing was issued by District Chief Judge Paul C. Johnson, Jr., Office of Administrative Law Judges, Newport News, Virginia. It advised the parties that the matter was before the Office Of Administrative Law Judges, and stated the required actions of the parties, including Notice Of Appearance.

On letter dated December 15, 2017, Travis W. Vance, Esq., submitted his Notice Of Appearance on behalf of the Respondent. On December 21, 2017, the undersigned issued a Notice Of Assignment advising the parties that the case had been assigned to Judge Rosen for hearing and decision.

### **Respondent’s Motion to Dismiss**

By Motion dated January 10, 2018, Respondent filed its Memorandum In Support Of Respondent’s Motion To Dismiss.

By Motion dated January 17, 2018, Complainant filed a timely response and Memorandum In Opposition To Respondent’s Motion To Dismiss.

Respondent argued in its Motion that Complainant did not follow appellate procedure, did not serve Respondent or counsel for Respondent with his objections and request for hearing within 30 days, and therefore the objections and request for hearing should be dismissed as not timely filed. Respondent argued that Complainant did not comply with the Secretary's Findings and the procedural rules of 29 CFR section 1987.105 ( c ) such that his objections and request for hearing should be dismissed.

Section 1987.105( c ) provides:

The findings and any preliminary order will be effective 30 days after receipt by the Respondent (or the Respondent's legal counsel if the Respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, **unless an objection and/or a request for hearing has been timely filed as provided at section 1987.106.** (Emphasis added by Respondent)

Respondent further relied upon 29 CFR 1987.106 which requires that objections **must** be mailed to all parties of record.

Section 1987.106 provides:

Objections **must** be filed with the Chief Administrative Law Judge, U. S. Department of Labor, and **copies of the objections must be mailed at the same time to the other parties of record,** the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division Of Fair Labor Standards, U. S. Department of Labor. (Emphasis added by Respondent).

Respondent argued that the statutory language is mandatory in that it states that "copies of the objections **must** be mailed" to the parties. (Emphasis added).

Respondent argued that the language in the Secretary's Findings is also mandatory. Respondent cited to the October 5, 2017 Secretary's Findings that state that within 30 days of receipt of the findings, the "objections **must** be filed in writing with [Chief Administrative Law Judge]... with copies to [Respondent's attorney]. (Emphasis added)

Respondent argued that, "The plain language of the regulations are clear, and they must be enforced as written." Respondent stated that per Lamie v. U.S.Tr., 540 U.S. 526, 534 (2004), "It is well-established that when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." Respondent also relied upon Clark v. Absolute Collection Service, Inc., 741 F.3d. 487,

490 (4<sup>th</sup>Cir. 2014) quoting Lamie. The complaint here filed by Complainant falls within the jurisdiction of the Fourth Circuit inasmuch as he worked in North Carolina.

Respondent argued that Complainant failed to provide Respondent with a copy of his objections and request for a hearing that was filed with the Office Of Administrative Law Judges. Respondent argued that, “As a result of Complainant’s failures, the October 5, 2017 Findings became effective thirty (30) days after receipt....” Respondent argued that based on 29 CFR sections 1987.105 and 106, Complainant’s objections and request for hearing should be dismissed.

### **Complainant’s Opposition**

Complainant filed his Memorandum In Opposition To Respondent’s Motion To Dismiss. He did not address the procedural and statutory requirements of 29 CFR sections 1987.105 and 106 for filing objections and request for a hearing. Complainant argued the facts of his case regarding his work as General Manager, the alleged packaging of out of date meat, the alleged repackaging of flour, the termination of other employees, and discipline of employees working for the Respondent.

Complainant opposed Respondent’s Motion arguing that self-represented litigants should be excused from following general procedural rules. Complainant cited to California state law stating that “California rules express a preference for resolution of every case on the merits even if resolution requires excusing inadvertence by a pro se litigant that might otherwise result in a dismissal.” Complainant cited to court information from the California website [courtfinfo.ca.gov](http://courtfinfo.ca.gov). Complainant also argued that per California state rules, “the court should take whatever measures may be reasonable and necessary to ensure a fair trial.”

### **Respondent’s Reply**

On January 20, 2018, Respondent filed its Reply Memorandum. Respondent argued that Complainant relied upon California law urging leniency for pro se litigants and did not address “his failure to follow the clear and unambiguous objection procedure.” Respondent argued that Complainant did not follow the procedures of 29 CFR section 1987 which set out mandatory requirements for filing objections and request for hearing. Respondent argued that Complainant did not follow the procedures and did not argue that he did. “As a result, Complainant waived any argument to the contrary....The motion is based upon uncontroverted procedural and jurisdictional deficits that are fatal to his claim.” Respondent argued that the court must reject any plea for leniency when a party does not timely file objections. Respondent relied upon Fourth Circuit and Supreme Court case law regarding procedural rules even without counsel. “Neither [the Fourth Circuit] nor the Supreme Court has ever ‘suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.’ ” United States v. Lavabit, LLC (In re Under Seal), 749 F.3d 276, 290 (4th Cir. 2014) (quoting McNeil v. United States, 508U. S. 106, 113 (1993))

Respondent argued that Complainant’s appeal should be dismissed and that the Secretary’s Findings were final.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In the case of Mr. Knoke, there is no evidence that he complied with the clear statutory language of 29 CFR 1987.106 and the Secretary's Findings that a party objecting to the findings "must" send a copy of the objections to the Respondent at the same time as it is filed with the Chief Administrative Law Judge within 30 days. The statutory language is clear and unambiguous regarding the timeline and the obligations of the parties.

The United States Supreme Court case law is precedent for this court inasmuch as this is a federal matter. California state law does not govern or apply to a federal Food and Drug Administration complaint.

The case law of Lamie, McNeil, Lavabit, and Clark, discussed in detail above, controls this case regarding statutory construction. In addition, the United States Supreme Court in McNeil held that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." In McNeil, the Respondent "was not served with a copy of petitioner's complaint" until one year later, although there was a six-month time limitation. In McNeil, the United States Supreme Court affirmed the United States Court of Appeals that affirmed the United States District Court, holding that it properly dismissed the suit because petitioner "failed to heed that clear statutory command,..."

For matters arising out of FDA Food Safety and Modernization Act , and pending before the United States Department of Labor, proceedings before the Office of Administrative Law Judges are guided by the Administrative Procedure Act, 5 U.S.C. 554, et. seq., and federal regulations at 29 C.F.R. Part 18A.

Pursuant the Rules Of Practice And Procedure For Administrative Hearings Before The Office Of Administrative Law Judges, 29 C.F.R. § 18.70 ( c ), Motions for Dispositive Action, section ( c ) Motion to Dismiss, "a party may move 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. If the opposing party fails to respond, the judge may consider the motion unopposed."

Based on a review of the OSHA and court records, the Regulations, Act, and the arguments of the parties, Complainant did not timely file his objections and request for a hearing because he did not send a copy to the Respondent's counsel of record.

Complainant did not comply with the mandatory requirements when filing his objections and request for a hearing. He did not send a contemporaneous copy to opposing counsel. Accordingly, his objections are not properly filed within the time limits of the regulations. Due to its "untimeliness," this matter cannot be heard by the U. S. Department of Labor, Office of Administrative Law Judges. The Secretary's Findings are final, and the Complaint is dismissed.

## CONCLUSION

After considering the arguments of the Complainant, the Respondent, the facts, the clear language of the statute, the clear language of the requirements enumerated in the Secretary's Findings, the case law, Complainant did not meet the requirements for filing his objections to the Secretary's Findings and requesting a hearing. Complainant did not follow the clear directive that he "must" send a copy of the same at the same time to opposing counsel.

## ORDER

It is hereby **ORDERED** that the complaint in the above-captioned matter is **DISMISSED** with prejudice 1.

**SO ORDERED.**

DANA ROSEN  
Administrative Law Judge

DR/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

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<sup>1</sup> Definition: barred from filing another case on the same claim.

(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).