



Issue Date: 29 March 2019

CASE No.: 2019-FDA-00001

In the Matter of:

CALVIN AUSTIN, JR.,
Complainant,

v.

BIRDSONG CORPORATION DBA
BIRDSONG PEANUTS,
Respondent.

**DECISION AND ORDER DISMISSING CLAIM WITH PREJUDICE FOR
ABANDONMENT**

ORDER AFFIRMING SECRETARY'S FINDINGS

This case arises out of a complaint filed under the employee protection provision of the FDA Food Safety Modernization Act, Section 402 of P.L. 11-353 (FSMA).

On September 24, 2018, the Regional Supervisory Investigator for the Occupational Safety and Health Administration (OSHA), issued the Secretary's Findings. She stated that following an investigation, "The Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IV, finds that there is no reasonable cause to believe that the Respondent violated FSMA..." She concluded that, "No evidence was discovered during this investigation that showed that Complainant's alleged engagement in protected activity is what lead to his termination." Accordingly, the complaint was dismissed.

Complainant appealed the Secretary's Findings. The matter was referred to the Office of Administrative Law Judges, U. S. Department of Labor, and assigned the undersigned Judge.

A Notice of Hearing and Scheduling Order was issued by Judge Rosen on February 14, 2019 scheduling this matter for hearing to commence on June 7, 2019 in Atlanta, Georgia. A copy was sent to all parties and was sent to unrepresented Complainant by certified mail. On March 12, 2019, the court received the Complainant's certified Notice of Hearing back from the U.S. Post Office. It was date stamped March 7, 2019 and stamped "return to sender, unclaimed, unable to

forward.” On March 13, 2019, a Show Cause Order was issued since it appeared this matter was abandoned by Complainant. Complainant did not respond.

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).

The Administrative Procedures Act, 5 U.S.C. §556 and Federal Regulations at 29 CFR §18.12 task the Administrative Law Judge with “all powers necessary to the conduct of fair and impartial proceedings.”

In this case, the Complainant has not complied with the court’s Order to Show Cause and has not responded to the show cause order. The administrative file indicates that the Complainant has essentially abandoned his claim before the Office of Administrative Law Judges.

ORDER

After review of the administrative file, it is hereby **ORDERED** that:

1. The proceedings in the above captioned matter are **CANCELLED**.
2. The hearing scheduled for June 7, 2019 is **CANCELLED**.
3. Complainant’s claim is **DISMISSED** with prejudice, which means he cannot refile this claim.
4. The Secretary’s Findings in this matter are **AFFIRMED**.

SO ORDERED.

Dana Rosen
Administrative Law Judge

DR/mjw
Newport News, Virginia

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).