



Issue Date: 17 September 2020

CASE NO.: 2019-FDA-00006

IN THE MATTER OF

MARY ANN ELLIS

Complainant

v.

GOODHEART SPECIALTY MEATS

Respondent

**AMENDED ORDER GRANTING RESPONDENT'S  
MOTION FOR SUMMARY DECISION<sup>1</sup>**

This proceeding arises pursuant to a complaint alleging violations under the employee protection provisions of Section 402 of the FDA Food Safety Modernization Act (also referred to herein as “the Act” or “FSMA”), Pub. Law 111-353 (Jan. 4, 2011), codified at 21 U.S.C. § 399d, and the procedural regulations found at 29 C.F.R. 1987.100, *et seq.* (2015). On August 19, 2020, Respondent GoodHeart Specialty Meats (“GoodHeart”) filed a Motion for Summary Decision alleging that Complainant Mary Ann Ellis (“Ellis”) cannot establish at least one element of her *prima facie* case of retaliation under the FSMA. Ellis timely responded to the Motion.

For the reasons stated below, the undersigned grants the Respondent’s Motion for Summary Decision, entering judgment as a matter of law in favor of the Respondent. Therefore, the Amended Complaint is dismissed, and the hearing scheduled for September 24, 2020, is cancelled.

**I. Relevant Procedural History**

Complainant Ellis was represented by counsel at the time she initially filed her Complaint in the present case. Ellis’ complaint in this proceeding was nearly identical to the complaint she filed via counsel in federal district court, *Ellis v. Bluebonnet Venison Farms, Inc.*, et al., Case No. 5:18-cv-1219-JKP, U.S. District Court for the Western District of Texas.<sup>2</sup> Specifically, the counts in the her administrative Complaint filed with this Court and the district court complaint cited Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act,

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<sup>1</sup> This amendment of the Order, which originally issued 09/03/2020, is to include a Notice of Appeal rights (at the conclusion of the Order).

<sup>2</sup> The district court dismissed Ellis’ complaint on October 29, 2019, finding that Ellis failed to plausibly allege that she was qualified for the position of Door Monitor and thus could not establish an element of the *prima facie* case of discrimination. (Respondent’s Motion, Exh. D).

included the same factual allegations, and Ellis made no reference in this case to the type of protected activity and/or adverse actions covered by the employee protection provisions of the FSMA.

Ellis' attorney was permitted to withdraw on August 19, 2019, and Ellis has been self-represented since that time. On October 17, 2019, I ordered Ellis to show cause as to why her complaint should not be dismissed for failing to state a claim of retaliation under the FSMA over which this Court has jurisdiction. On January 6, 2020, after permitting an extension of time for Ellis to respond to the show cause order, I dismissed the original complaint for failing to state a claim on which relief can be granted by this Court, noting that Ellis had only briefly referenced a food safety issue in her complaint that did not indicate whether Ellis engaged in any protected activity regarding the issue or that she was discharged in connection with such activity.

On January 31, 2020, I received Ellis' nine-page, handwritten Amended Complaint that raised, like her first Complaint, a number of the same allegations over which this Court does not have jurisdiction. The undersigned determined, however, that on pages 6 to 7 of the Amended Complaint, Ellis alleged that she observed on July 6, 2017, chicken that smelled "bad" that was "grayish," "spoiled," and "contaimented [sic]," which she says she reported to "the supervisor." Ellis alleged that "the next week" she saw chicken in "bad" condition that had "fallen to the floor" and was picked up by "line workers." At this point, Ellis alleges she called the Department of Health, and they directed her to other agencies that she called including OSHA, Food and Drug Administration, Department of Labor, and the U.S. Department of Agriculture (USDA). Ellis alleged that "harassment continued and got worse" after she made these reports, because "apparently" one of the agencies told the company about her complaint. The undersigned liberally construed the allegations of a self-represented party, considered the elements of a claim of retaliation under the FSMA, and determined that Ellis sufficiently stated a claim under Section 402 of the FSMA. *See* 21 U.S.C. § 399d(a)(1)-(4); 29 C.F.R. § 1987.102(a), (b). (Amended Notice of Hearing and Pre-Hearing Order dated February 14, 2020). The period of discovery closed on August 25, 2020.

## **II. Material Facts not Genuinely in Dispute**

In reaching the conclusions herein, the undersigned reviewed the evidence of record so far and deemed the following material facts to be undisputed<sup>3</sup>:

1. GoodHeart hired Ellis in January 2017 to be a Door Monitor. (Ellis Depo. Tr. 24; App. 81).
2. The Door Monitor job<sup>4</sup> requires greeting employees entering and exiting their production area; handing out/managing supplies and personal protective equipment on a daily basis;

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<sup>3</sup> The Deposition of Ellis taken July 10, 2019, is marked Respondent's Exhibit B and appears in Respondent's Appendix between pages 5 and 42. When citing Ellis' deposition, the page numbers of the deposition transcript are cited. For all other exhibits, the pages numbers of the Appendix are cited.

<sup>4</sup> The Door Monitor job description in evidence was updated August 28, 2017. (App. 68). Ellis contends that when hired in early January 2017, she explained her lifting restriction of 10 pounds and was able to do her job for many months without problems until the change of the job requirements. (App. 81).

picking up small trash items from the floor; preparing a sanitizing boot bath that required using of a five gallon bucket at least half full and lifting the bucket to pour the contents into a boot cleaning trough; and mopping. The physical requirements of the job included carrying up to 30 pounds, refilling 5-gallon boot wash buckets as needed with about 2 to 2 ½ gallons of chemicals, and sweeping floors. (App. 68-69; Ellis Depo. Tr. 24-29).

3. When Ellis applied to be a Door Monitor, she stated ability to perform all the physical requirements without accommodation. (App. 44-45).
4. Shortly after starting work at Goodheart in January 2017 and continuing into October 2017, Ellis started making verbal and written complaints to GoodHeart alleging racial discrimination, starting with the conduct of another Door Monitor, Penny Burke. (Ellis Depo. Tr. 46-49, 104-19). Ellis acknowledged under oath in her deposition that the complaints did not mention food safety. (Id. at 116, 119, 120, 123). The written complaints and Respondent's memo documenting complaints made verbally made no mention of food safety. (Appx. 53-67). The written complaints were dated 8/15/17, 8/22/17, 9/21/17, 9/29/17, 10/6/17, and 10/12/17. (Id.).
5. On August 21, 2017, Ellis signed a memo prepared August 16, 2017, by Crystal Ojeda (human resources manager), summarizing Ellis' concerns at the time, which did not include food safety. (App. 55-56, 141). The memo identified concerns about usage of supplies and tracking of inventory. Although a new supervisor had mentioned over usage of supplies on the second shift (Ellis' shift), Ellis raised concerns that other door monitors on the first shift were hoarding supplies and that she (Ellis) was being improperly blames for overage and inventory problems. (Id.).
6. Ellis' references to mistreatment in her several complaints to GoodHeart were meant to refer to a racial slur by Ms. Burke, that other employees were hiding supplies from her, and treatment she received in response to her report of a workplace injury to her hand. (Ellis Depo. Tr. 137). In fact, Ellis stated in her complaint dated October 12, 2017, that she was complaining about "unfair treatment toward employee's (racial discrimination)." (App. 66).
7. Ellis held the opinion on or around July 6, 2017, that chicken being processed at GoodHeart was "bad." (Ellis Depo. Tr. 78, 82). She testified she told the USDA and several different production line and Quality Assurance (QA) employees, and a production line supervisor.<sup>5</sup> (Id. 78-79, 81, 83, 85). She did not make any written food safety complaint. (Id. 119). Ellis made verbal comments about "bad" chicken to another employee (Darby) when Ellis was on her way to go on break, to an employee who was a line lead "on the cook side" (Rodney), and to a different employee (Lopez) in the break

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<sup>5</sup> Ellis testified that she told Babbie Parker (fellow door monitor), Robert Lopez (an employee), Nate Darby and "Barissa" (in QA), an employee named "Andrew," "two ladies named Beatrice," "a guy named Emmanuel," two employees (Robert Lopez and "Maladoni") on the "injection side" of the production area, line leads "Rodney" and Keith Allcock, "Roberto," and production ("cook side") supervisor Frank Gonzalez that she thought the chicken looked "bad." (Ellis Depo. Tr. 63-65, 78-79, 84-85). Frank Gonzalez told Ellis that they washed the meat; Ellis did not know what that meant. (Id. 63-64).

room. (Id. 81-82, 85-86). She indicated Darby was not supervisory and did not have authority to “sign off” on the quality of chicken. (Id. 82-83). Ellis never made a complaint about chicken falling “on the floor,” because she never saw it happen. (Id. 84).

8. Ellis was aware that QA at GoodHeart was responsible to remove meat failing to meet USDA standards, and that QA approved chicken for processing that Ellis labeled as “bad.” (Ellis Depo. Tr. 62, 63). According to Ellis, she was told that the meat was “washed” and “okay to go out.” (Id. 63). She did not know what it meant to wash or sanitize meat. (Id. 63-64). Ellis was not a QA employee, was not trained in QA, did not previously work in QA, did not have training on how to determine the quality of meat, did not previously work in any capacity to evaluate the quality of meat, was not familiar with the process of washing food in a bacterial product to kill bacteria and did not have work experience with that aspect of poultry processing, and she did not have training on USDA standards. (Ellis Depo. Tr. 62-65).
9. Ellis was aware that the USDA inspected the quality of GoodHeart’s meat at the facility daily. She believed that a USDA inspector “knows what bad meat looks like.” (Ellis Depo. Tr. 63, 87). If USDA ever detected a problem with “bad” chicken, she was not aware. (Id. 87).
10. On October 18, 2017, Ellis received a disciplinary write-up for impermissibly leaving her workstation (“sitting at a desk when she should have been greeting and handing out supplies”). (App. 71-72; Ellis Depo. Tr. 140-41). In a meeting over the corrective action, Ellis informed GoodHeart that she could not lift more than 10 pounds. (Ellis Depo. Tr. 145). Present at the meeting were Ellis, Crystal Ojeda, Olga Wilson, and “Scott.” (Id. 140-41). Ellis did not sign the form because she disagreed she had impermissibly left her workstation. (Id. 141-42). It is not disputed that Ellis informed Scott that she had a lifting restriction. (Id. 143, 145). It was her position that this was not new information to the company because she had told a supervisor “Mr. Arnold” about this restriction earlier in her employment. (Id. 142-43, 146).
11. Years before working at GoodHeart, in the 1990’s, Ellis sustained a permanent back injury after being in a series of car crashes. (Ellis Depo. Tr. 6-7). She sought and received Social Security disability benefits, from 2005 to the present time, due to an inability to work full-time. (Id.). She did not work from the 1990s until 2010, though part of this period of unemployment (June 2008 to October 2009) was due to incarceration for bank fraud and bad checks. (Id. 38-39).
12. Ellis worked as a security officer for about seven months until she could not continue due to her back hurting. (Ellis Depo. Tr. 16, 18). She worked for Taste Foods for about nine months in 2012, doing intermittent and light-duty work involving setting up tables for parties and events until quitting because constant movement and cold temperatures caused her back to hurt. (Id. 16-17). After that, she worked for herself for one month preparing gift baskets and planning weddings. However, this ended after one month because the job aggravated her back pain. (Id. 14-15). Ellis then worked at Fresh Farms as a temporary employee for about ten months from February to December 2016. She

printed out labels on a computer and issued supplies like gloves and protective equipment. Doing this work full-time made her back hurt and the cold workplace increased her back pain, so she quit that job. (Id. 9-10, 12-13).

13. After Ellis told Scott on October 18, 2017, that she was not supposed to be lifting over 10 pounds, she was temporarily relieved of her duties temporarily and asked for a doctor's release before she would be allowed to continue performing the essential duties of Door Monitor. (Ellis Depo. Tr. 143, 145-46).
14. Ellis returned with a doctor's release dated October 20, 2017, that included a release to return to work October 23, 2017, with a restriction against lifting more than 10 pounds. (App. 74). GoodHeart told Ellis that she needed a full release with no restrictions. (Ellis Depo. Tr. 147; App. 81).
15. Ellis filed an EEOC complaint on October 23, 2017, alleging race and disability discrimination. (Ellis Depo. Tr. 147-48; App. 76-79).
16. Ellis underwent a Functional Capacity Evaluation (FCE) on January 4, 2018, which was administered by registered occupational therapist E. Reuben Rodriguez, at the request of C. William Murphy, M.D. (App. 86). Ellis was deemed unable to carry up to 30 pounds, refill and empty the 5-gallon boot bucket, prepare the foot bath, or make "start up bundles," some of the essential duties of Door Monitor. Ellis was found able to lift up to 20 pounds occasionally and not repetitively. As a result of the FCE, Ellis was medically deemed unable to meet the physical demands of a Door Monitor. (App. 88).
17. Ellis later testified that there were elements of the Door Monitor job that she could not physically perform including lifting, sweeping, mopping, and picking up trash. (Ellis Depo. Tr. 167-70). Although she testified she could do the job, she admitted it would require accommodations. (Id. 173-74, 177-80).
18. On March 6, 2018, GoodHeart's COO, Tom Christensen, sent Ellis a letter advising that GoodHeart could not accommodate work restrictions identified in the FCE and thus discharged her from employment. (App. 103-04).
19. On several occasions after her discharge, up through her deposition on July 10, 2019, Ellis identified several purported inappropriate or unlawful reasons for her discharge which did not include food safety complaints. Claimant's initial EEOC claim alleged discrimination on the basis of race, color, disability, age, gender, and national origin. The claims were dismissed. (App. 76-79). She later amended the charge of discrimination (August 16, 2018) to include "retaliation." (App. 139). The Affidavit in support of her amendment repeatedly refers to Ellis' allegations that her lifting restrictions should have been accommodated; again, she did not mention food safety or having made complaints about safe food handling.<sup>6</sup> (Id. 140-44). When seeking unemployment benefits in Texas,

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<sup>6</sup> In the sworn Affidavit, Ellis attested that she had never been convicted of a crime of moral turpitude. (App. 140). In her deposition, Ellis admitted to prior convictions for bank fraud and theft by check. (Ellis Depo. Tr. 215-16). The day after the deposition, Ellis' attorney notified her by letter that he would seek to withdraw from representing

Ellis told the Texas Workforce Commission that she was not being allowed to work because her physical restrictions were not being accommodated by GoodHeart. She did not mention having made food safety complaints. (App. 83, 106, 108-09, 116-17). Her claim filed October 24, 2017, alleged only disability discrimination, and while seeking these benefits she alleged only disability and race discrimination. (Id.). During her deposition, Ellis repeatedly stated her belief that she was fired because of her race. (Ellis Depo. Tr. 46, 48-49, 107, 110-11, 116, 120, 125, 137-39, 148, 189, 205, 207).

20. On September 4, 2018, Ellis filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that she was unjustly discharged for making complaints about the safe handling of Respondent's food product. (App. 134; Ellis Depo. Tr. 204-05). Specifically, she alleged that she "reported violations in the way chicken processing was carried out." (App. 135). The investigator determined that the evidence demonstrated Ellis was discharged because she was unable to perform her duties due to a medical condition. Therefore, there was insufficient evidence of a causal connection between alleged protected activity and the adverse employment action. (Id.). In Ellis' estimation, "OSHA has covered up for GoodHeart," and "They [OSHA] are going to always do what the company wants." (Ellis Depo. Tr. 210, 211).
21. Ellis was asked about her OSHA complaint alleging unsafe food handling during her deposition: "So why do you think you were discharged because you made a safe food handling complaint? Did somebody say we are firing you because you made a safe food handling complaint? Ellis answered, "It was due to my race, mistreatment." (Ellis Depo. Tr. 205). Later she was asked, "Now, what facts or evidence make you believe that that was the reason that GoodHeart fired you, because you made a food safety complaint?" Ellis responded, "They complained – they fired me because they said I complained too much. I reported too many things." ((Id. 206). And when asked, "So [] what facts or evidence did you plan to show the judge to demonstrate that the company fired you for the specific reasons that you made a food safety complaint?" Ellis testified, "Well, mistreatment" and "Race, they were racists." (Id. 207).

### **III. Respondent's Motion for Summary Decision and Complainant's Response**

#### *Motion for Summary Decision*

GoodHeart contends that Ellis cannot establish a *prima facie* case of retaliation under the FSMA for several reasons, including her inability to show that she engaged in protected activity. (Motion for Summary Decision, pp. 11-15). According to GoodHeart, Ellis never produced any documents to support her contention that she complained to GoodHeart about any food safety issues, after having been served with document requests seeking such documentation on two occasions and deposed on the matter. GoodHeart further argues that Ellis has no education in, experience with, or knowledge of food safety or quality assurance requirements under the USDA. Therefore, she could not have made a good faith complaint protected by the FSMA. Additionally, GoodHeart argues that Ellis' allegations are so overly vague and general to

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her in federal district court and in the instant proceeding due to her testimonial admission that she had been less than truthful in her EEOC affidavit and in her intake interview with her attorney. (App. 146).

constitute protected activity, even if true. (Id. at 15-16).

GoodHeart also asserts that it had no knowledge of any alleged protected activity, relying on the prior findings of the OSHA Investigator and the testimony of Ellis. (Id. at 16-18). GoodHeart contends that if the Court somehow concludes that Ellis engaged in protected activity, there is no genuine dispute that her activity was not a contributing factor to the decision to discharge her. (Id. at 18-20). GoodHeart submits that the FCE performed on January 4, 2018, which concluded Ellis was unable to perform the physical demands of her position of Door Monitor, was the sole, legitimate and non-discriminatory basis for her termination. GoodHeart seeks the resolution of any credibility determinations in its favor due to Ellis' "multiple misrepresentations," perjury on applications for employment and in her EEOC charge, and misconduct so egregious that her attorney moved to withdraw in this matter and the federal district court proceeding. (Id. at 20).

### *Ellis' Response*

Ms. Ellis' response contains no supporting evidence or citations to specific evidence. Ellis instead argues that she will demonstrate to the Court that there were violations, which includes acts of purported racial discrimination, mismanagement of supplies, and an "unsafe working environment" related to an injury to her right hand sustained on June 8, 2017. She contends harassment came from her supervisor Olga Wilson, who yelled at Ellis for something not completed on the job. Also, Ellis again includes allegations that she complained about "bad" chicken during the first week in July 2017. Supervisors Frank Gonzales and "Roberto" told her that the employees "wash" the meat. Ellis also describes having a lifting restriction because of her back condition that she contends should have been accommodated.

## **IV. Issue**

The issue for resolution is whether any genuine issues of material fact exist regarding the essential elements of Complainant's claim, making summary decision inappropriate.

## **V. Analysis**

### **A. Summary Decision Standard**

Summary decision is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. § 18.72. The movant bears the burden to show the absence of a genuine issue of material fact and all justifiable inferences are drawn in favor of the non-moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252. In determining if summary decision is appropriate, all reasonable inferences must be drawn in favor of the non-moving party, credibility determinations may not be made and evidence may not be weighed. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact,

the non-moving party cannot rest on its pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324; 29 C.F.R. § 18.72.

In responding to a motion for summary decision, the non-moving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his or her favor. *See* 29 C.F.R. § 18.72 (c). The Administrative Review Board (“ARB” or “Board”) has held that “if the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact.” *Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). A non-moving party cannot defeat a summary decision motion without presenting “significant probative evidence” to support its complaint. *See Anderson*, 477 U.S. at 249. When the information submitted for consideration with a motion for summary decision and the reply to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, a motion for summary decision must be denied.

## **B. Elements of Retaliation Claim under FSMA**

The FSMA amended provisions of the Food, Drug, and Cosmetic Act (“FD&C”) and adopted a new whistleblower protection provision that contains procedural and remedial protections for whistleblowers in the food industry. The relevant provisions of the FSMA provide that an employee is protected under the FSMA against retaliation because the employee (or any person acting pursuant to a request of the employee) has:

- (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 the FD&C or any order, rule, regulation, standard, or ban under the FD&C;
- (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 the FD&C, or any order, rule, regulation, standard, or ban under the FD&C.

21 U.S.C. § 399d(a)(1)(emphasis supplied).

Ellis, as Complainant, must demonstrate (i.e., prove by a preponderance of the evidence) that (1) she engaged in protected activity of the employer was aware, (2) the employer took some adverse action against her, and (3) that her protected activity was a “contributing factor” in an adverse personnel action. *See* 21 U.S.C. § 399d; Procedures for Handling Retaliation

Complaints Under Section 402 of the FDA Food Safety Modernization Act, 81 Fed. Reg. 22530-01, 22532-33 (April 18, 2016) (codified at 29 C.F.R. pt. 1987); *Chase v. Brothers Intern. Food Corp.*, 3 F.Supp.3d 49, 53-54, (W.D.N.Y. 2014); *Sylvester v. Parexel Int'l LLC*, ARB 07-123, 2011 WL 2165854 at \*7 (ARB Mary 25, 2011); *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, 2016 WL 1389927 at \*4 (ARB Mar. 30, 2016); *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, 2016 WL 866116 at \*1, n. 3 (ARB Feb. 18, 2016).

If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. *See* 21 U.S.C. § 399d(b)(2)(C).

1. Is there a genuine issue of disputed fact as to whether Complainant engaged in protected activity under the FSMA?

Ellis alleges a potential violation under §399d(a)(1), in that she alleges she complained about a food safety issue (“bad” chicken) in early July 2017.<sup>7</sup> Under the statute, Ellis engaged in protected activity if she made such a complaint relating to any act or omission that she reasonably believed to be a violation of any provision of the FD&C.

Reasonable belief has a subjective and objective component. “The ARB has interpreted the concept of ‘reasonable belief’ to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable, ‘i.e. [she] must have actually believed that the employer was in violation of [the relevant] statute and that belief must be reasonable for an individual in [the employee’s] circumstances having [her] training and experience.’” *Sylvester*, ARB 07-123, 2011 WL 2165854 (citing *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000)); *see also*, *Brown v. Wilson Trucking Corp.*, ARB No. 96-164, ALJ No. 1994-STA- 054, slip op. at 2 (ARB Oct. 25, 1996)(citing *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994)).

“Subjective reasonableness requires that the employee actually believed the conduct complained of constituted a violation of pertinent law.” *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.10 (1<sup>st</sup> Cir. 2009) (quoting *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008)). A whistleblower does not have to identify specific statutory provisions or regulations when complaining of conduct to an employer. *Welch*, 536 F.3d at 279. An employee may have a mistaken but reasonable belief that the complained of conduct constitutes a violation, and an actual violation of a listed law is not required for engagement in protected activity. *Sylvester*, ARB 07-123, 2011 WL 2165854 at \*16. Objective reasonableness is evaluated “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Harp v. Charter Communs., Inc.*, 558 F.3d 722, 723 (7<sup>th</sup> Cir. 2009).

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<sup>7</sup> Complainant does not allege she testified or participated in a proceeding about a violation or objected to an assigned task within the meaning of §399d(a)(2)-(4).

The only evidence of a food safety complaint is Ellis' deposition testimony that she complained about "bad" chicken or chicken that "looked bad" on or around July 6, 2017. Ellis described these complaints as remarks she made to other employees in the break room or on her way to take a break. She stated that these were not formal, written complaints like the ones she filed raising other claims of mistreatment. While a verbal complaint may be protected activity and a complaint to a supervisor may be imputed to Respondent, Ellis did not allege, and no evidence of record demonstrates, that she made complaints relating to a condition that she reasonably believed violated the FD&C, or that she made such complaints to "the employer, the Federal Government, or the attorney general of a State." *See* 21 U.S.C. § 399d(a)(1).

Further, Ellis admitted that she does not have training or experience in how to determine the quality of meat, did not previously work in any capacity to evaluate the quality of meat, and she did not have training on USDA standards. She was not aware of either GoodHeart's QA personnel or USDA inspectors identifying a problem associated with meat quality, though she presumed such individuals were qualified to identify any such problems. The undisputed evidence reflects that Ellis had no training, work experience, or otherwise any knowledge base regarding relevant food safety laws such that she had no reference point on which to determine whether meat quality violated a pertinent law or not. Ellis' work history reveals no relevant experience in quality assurance such as food quality or food safety. Ellis was not aware of any defect in the quality of meat identified by the plant's QA or by the USDA. Therefore, based on the evidence of record here, Ellis' general complaint about "bad" chicken cannot constitute a subjectively or objectively reasonable belief that the complained of conduct constituted a violation of pertinent law.

2. Is there a genuine issue of material fact as to whether Complainant suffered an adverse action?

There is no genuine dispute that Complainant's termination on or about March 6, 2018, was an adverse personnel action. *Withers v. Johnson*, 763 F.3d 998, 1005 (8<sup>th</sup> Cir. 2014).

3. Is there a genuine issue of material fact as to whether protected activity, if any, was a contributing factor to the adverse action?

As with other "contributing factor" statutes, a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, slip. op. at 11, 29 (ARB March 20, 2015); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 689-91 (7<sup>th</sup> Cir. 2009) (discussing *Marano* as applied to analogous whistleblower provision in the ERA); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at \*3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)). A contributing factor may be proven by "direct evidence or indirectly by circumstantial evidence." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. 6—7 (ARB Feb. 29, 2012).

Complainant must come forth with some evidence of a connection between the adverse action and the protected activity. *See e.g., Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec’y Feb. 16, 1989). Complainant, as the party opposing the Motion for Summary Decision, must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c). In viewing the evidence in light most favorable to Complainant, Complainant is unable to establish a causal connection, i.e., that any alleged food safety complaint in or around July 2017, was a contributing factor to the adverse action she suffered in March 2018.

The evidence reflects that Ellis told some production and quality employees, or “ordinary” employees, her complaint about “bad chicken.” However, the statements and actions of ordinary employees are normally not imputable to the employer. *Long v. Eastfield Coll.*, 88 F.3d 300, 306 (5th Cir. 1996). The Fifth Circuit recognizes the “longstanding principle that, in determining whether an adverse employment action was taken as a result of retaliation, [the] focus is on the final decisionmaker,” unless the employee can demonstrate that others with knowledge of protected activity had “influence or leverage” over the official decisionmaker. *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002) (citations omitted). In *Gee*, the Court determined that summary judgment should not have been granted where there was a triable issue of fact whether the decisionmaker was influenced by others who made derogatory comments at a meeting about the employee attended by the decisionmaker. *Id.* at 346-47; *see also Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 168 (5th Cir. 1999) (“If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct.”); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267-68 (5th Cir. 1994) (noting absence of causal connection between protected activity and discharge of employee where decisionmaker not shown to be aware of complaints and ten months elapsed from complaint to discharge suggesting that retaliatory motive “highly unlikely”). Here, in contrast, no triable issue of fact exists because the evidence reflects that none of the individuals to whom Ellis says she communicated a complaint about “bad chicken” or that chicken “looked bad” in July 2017 are shown to be either supervisory, with the ability to implement an adverse action against her, or individuals with any influence whatsoever over COO Tom Christensen, who discharged Ellis on March 6, 2018, because the company could not accommodate the work restrictions identified in her FCE. The events leading up to Ellis’ March 6, 2018, discharge were consistent with the stated, non-retaliatory reason for discharge, in that the company was clearly evaluating Ellis’ physical capacity to perform her job. Also, the individuals involved in the October 2017 write-up for Ellis impermissibly leaving her workstation (Ojeda, Wilson, Scott), which led to the FCE to assess Ellis’ physical capabilities and ultimately led to Ellis’ discharge on March 6, 2018, are also not implicated by Ellis in any way in her verbal complaints regarding “bad” chicken.

Further, eight months elapsed between early July 2017 and early March 2018, without any intervening events to suggest that the Respondent’s discharge decision had any causal connection to Ellis’ comments or complaints about “bad” chicken. In those months, Ellis’ complaint trail was focused instead on her claims of race discrimination, mistreatment related to managing supplies, and whether she was physically able to do the job of Door Monitor. In those complaints, she did not mention either food safety or any persons to whom she made complaints about bad chicken. The lack of close temporary proximity, combined with the absence of any

mention of food safety concerns in that temporal gap, further removes any inference of a causal connection between alleged protected activity and adverse personnel action. *See Withers*, 763 F.3d at 1005 (temporal proximity between protected activity and adverse action not sufficient to create genuine issue of material fact particularly where proffered non-discriminatory reason for termination arose in the same window of time).

Notably, when Ellis was asked directly on more than one occasion in her deposition, whether she believed she was discharged for making a food safety complaint, Ellis testified she was discharged “due to my race” and because “they were racists.” (Ellis Depo. Tr. 205, 207). Her testimony was consistent with her application for unemployment benefits, her EEOC charge, the complaint that she filed in federal district court, and her original complaint in this proceeding, which alleged racial discrimination, among other things, but did not allege retaliation under the FSMA. Ellis may not rest on her allegations in the amended complaint at this stage, and she has failed to identify a genuine dispute of material fact over whether any protected activity under the FSMA was a contributing factor to her discharge.

4. Is there a genuine issue of material fact as to whether Respondent would have taken the same personnel action in the absence of protected activity?

Having found that Complainant is unable to satisfy one or more elements of her claim of retaliation under the FSMA, the undersigned need not reach whether there are any disputed material facts regarding whether Respondent would have taken the same adverse action in the absence of protected activity by Complainant. Even so, Respondent has presented uncontradicted evidence of Complainant’s inability to physically perform all aspects of her position as Door Monitor, as determined by the January 2018 FCE, and that its decision to terminate Complainant was made soon after receiving the results of the FCE and was the only basis of termination set forth in the notice of termination. Specifically, the evidence is not disputed that Ellis informed the company on October 18, 2017, that she was not supposed to be lifting over 10 pounds,<sup>8</sup> and that the company immediately relieved Ellis of her duties pending a doctor’s release that would permit her to do all essential Door Monitor duties. After Ellis could not produce such a release, and after a thorough FCE deemed Ellis medically unable to meet the physical demands of a Door Monitor, Ellis was discharged. Ellis testified that she, in fact, required accommodations to fulfill all the essential duties of Door Monitor. The undersigned does not have jurisdiction over any question of whether the Respondent should have made the accommodations.

In light of this undisputed evidence, and also considering that the attenuated temporal proximity of any alleged food safety complaint to Ellis’ discharge raises no inference favorable to Ellis, and that no common personnel were involved in the alleged protected activity and the adverse personnel action, the evidence demonstrates GoodHeart would have discharged Ellis even if she had never complained about “bad” chicken.

## **VI. Conclusion**

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<sup>8</sup> While Ellis testified that she had told a different supervisor about the lifting restriction earlier, any dispute over this fact is not material to whether she can establish a claim of retaliation under the FSMA.

In the Order to Show Cause, Ellis was advised that when responding to a motion for summary decision, she was required under 29 C.F.R. § 18.72 to cite to particular parts of the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. Ellis was advised that under the rule, an affidavit or declaration must present facts within an individual's personal knowledge, set out facts that would be admissible in evidence, and show that the individual is competent to testify on the matters stated in the affidavit/declaration. Further, she was advised that any statement of inability to present essential facts to oppose the motion must be presented by affidavit or declaration. Even so, Ellis rested only on her allegations in response to the Motion. No evidence of record or sworn statement was submitted, or attestation of inability to secure essential evidence. Thus, material facts were not presented to dispute the evidence presented by Employer.

The undersigned concludes that constructing the evidence in the light most favorable to the non-movant, Complainant is unable to establish essential elements of her claim of retaliation under the FMSA, including that she engaged in protected activity and that alleged protected activity was a contributing factor to an adverse personnel action. The undisputed evidence also demonstrates that Respondent would have taken the same action in the absence of protected activity.

## **VII. Order**

Respondent's Motion for Summary Decision is GRANTED, the Amended Complaint is DISMISSED, and the formal hearing is CANCELLED.

So **ORDERED** this 17<sup>th</sup> day of September, 2020, at Covington, Louisiana.

**ANGELA F. DONALDSON**  
**Administrative Law Judge**

**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](mailto: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).