



In the Matter of:

LAN FARLEY,

ARB CASE NO. 2016-0091

COMPLAINANT,

ALJ CASE NO. 2015-FDA-0001

v.

DATE:

**AUG 20 2019**

ALTASOURCE, LLC, d/b/a,  
META LABS, LLC,

RESPONDENT.

**Appearances:**

*For the Complainant:*

Drew Mosley, Esq.; *Drew Mosley, LLC*; Lawrenceville, Georgia

*For the Respondent:*

William J. Piercy, Esq.; *Berman Fink Van Horn P.C.*; Atlanta, Georgia

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

## FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA or the Act)<sup>1</sup>, as amended by Section 402 of the Food Safety and Modernization Act of 2011<sup>2</sup> (FSMA), and its

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<sup>1</sup> 21 U.S.C. § 301 et seq. (1938).

<sup>2</sup> *Id.* § 399d (2016).

implementing regulations at 29 C.F.R. § 1987 (2016). Section 402 of the FSMA protects an employee who has engaged in protected activity pertaining to a violation or alleged violation of the FFDCA, or any order, rule, regulation, standard, or ban under the FFDCA, from retaliation. On April 7, 2014, Complainant filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), claiming that the Respondent retaliated against her for engaging in FSMA-related protected activities when it discharged her for raising safety concerns. Joint Exhibit 10; Administrative Law Judge Exhibit 3. OSHA dismissed the complaint and the Complainant asked for a hearing before an Administrative Law Judge (ALJ). After a hearing, the ALJ concluded that the Respondent had demonstrated by clear and convincing evidence that it would have discharged the Complainant in the absence of her protected activity. Complainant appealed to the Administrative Review Board (ARB or Board). For the reasons set forth below, we affirm the ALJ's decision and order.

### BACKGROUND

The Respondent is a Georgia company that manufactures and distributes dietary supplements and cosmetics. Decision and Order Denying Complaint (D. & O.) at 3. Bassam Khayat is the company president and his wife, Rosa Khayat, was at all pertinent times the vice president. Respondent's Exhibit at 3. The Complainant, Lan Farley, worked for the Respondent for eleven days from March 10, 2014, until her discharge on March 21, 2014. D. & O. at 3.<sup>3</sup>

On April 7, 2014, Complainant filed her complaint with OSHA. Subsequent to an investigation, OSHA determined (1) that there was no evidence to corroborate Complainant's claimed protected activity, and (2) that the investigation corroborated the Respondent's proffer that Complainant's discharge was the result of her failure to demonstrate proficiency in regulatory compliance matters, for which she was hired. OSHA thus dismissed the complaint. Administrative Law Judge Exhibit 4. Complainant objected to OSHA's determination and requested a hearing. Administrative Law Judge Exhibit 5.

After conducting a formal hearing, the ALJ concluded that Complainant had established that "[o]n some level . . . although it is difficult to discern exactly what,

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<sup>3</sup> The Separation Notice that Rose Khayat signed indicates, however, that the Respondent employed Complainant from March 9, 2014, to March 22, 2014. Joint Exhibit 4.

she engaged in protected activity.” D. & O. at 19. The ALJ also concluded, however, that Complainant did not meet her burden to establish that her protected activity contributed to Mr. Khayat’s decision to terminate her employment. *Id.* at 20-22. The ALJ further concluded that the Respondent had demonstrated by clear and convincing evidence that it would have discharged Complainant in the absence of her protected activity under 29 C.F.R. § 1987.109(b). Specifically, the ALJ reached the following conclusions:

For all these reasons, I find that even assuming, arguendo, that the Complainant made a prima facie case that her protected activity contributed to her termination based on temporal proximity, the Respondent has established by clear and convincing evidence that it would have fired her regardless of her protected activity, for legitimate non-retaliatory reasons having to do with work performance, inability to follow directions, and problems with communication. Furthermore, if the Respondent’s evidence is considered along with the Complainant’s to determine whether a prima facie case was established, *see* [the Board’s 2016 decision in] *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Jan. 6, 2017) pet. denied 723 F. App’x 522 (9<sup>th</sup> Cir. 2018)], then the Respondent’s evidence is sufficient to overcome any inference based on temporal proximity and precludes a finding that the Complainant even established a prima facie case that her protected activity contributed to her termination.

D. & O. at 26. Determining that the Respondent had thereby established its affirmative defense, the ALJ denied the complaint. *Id.* Complainant appealed to the Board, alleging error in the ALJ’s findings on protected activity, causation, and the Respondent’s affirmative defense. The Respondent opposes the appeal.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the Board to act on appeals from decisions by ALJs in cases brought under the FSMA and to issue final agency

decisions in those matters for the Department of Labor.<sup>4</sup> “The ARB will review the factual determinations of the ALJ under the substantial evidence standard.”<sup>5</sup>

## DISCUSSION

Dispositive to this case is the ALJ’s finding that the Respondent would have taken the same adverse action in the absence of Complainant’s protected activity.<sup>6</sup> 29 C.F.R. § 1987.109(b). D. & O. at 22, 26. Upon review of the ALJ’s D. & O. and the record evidence, we conclude that the ALJ’s decision is a reasoned ruling supported by substantial evidence and consistent with applicable law. The ALJ, acting within his discretion, rationally credited the testimony of both Mr. and Mrs. Khayat, the company’s president and vice president, that Complainant did not follow instructions; was not doing the compliance job duties for which she was hired; showed an inability to grasp what work product Mr. Khayat wanted from her; was not responsive to Mr. Khayat’s questions or work assignments; did not make reports as directed; failed to grasp the scale of the Respondent’s operation and its particular needs; did not provide solutions to specific problems; and did not show that she possessed the expertise she claimed to have. D. & O. at 22-24. The ALJ determined that the testimony of Mr. and Mrs. Khayat was consistent regarding the grounds for Complainant’s discharge, namely because she was not doing her job, had misrepresented her qualifications, and was not following instructions. *Id.* at 24-26. The ALJ’s conclusion that the Respondent had established by clear and convincing evidence that it would have discharged Complainant in the absence of her protected activity, thereby establishing its affirmative defense, is therefore supported by

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<sup>4</sup> Secretary’s Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1987.110(a).

<sup>5</sup> 29 C.F.R. § 1987.110(b).

<sup>6</sup> We note that where an employee’s regular job duties include reporting to his or her employer any suspected statutory or regulatory compliance violations, those duties may include protected activity under the plain language of 21 U.S.C. § 399d(a). However, this does not mean that the employee cannot be discharged for legitimate reasons unrelated to the protected activity. It is still a complainant’s burden to establish, by a preponderance of the evidence, that specific, identifiable instances of protected activity caused adverse action, just as it is the employer’s burden to properly prove any defense the statute provides.

substantial evidence and is in accordance with law.<sup>7</sup> On appeal, Complainant argues that her testimony and other evidence shows that she did in fact know what she was talking about at work and that she has an impressive resume. Complainant's Brief at 2, 4-5. The Board, however, gives considerable deference to an ALJ's credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable.<sup>8</sup> In this case, we hold that the ALJ's credibility determinations are neither inherently incredible nor patently unreasonable and thus, we defer to them.<sup>9</sup> Consequently, the ALJ's conclusion that the Respondent established by clear and convincing evidence that it would have discharged Complainant in the absence of her protected activity, thereby establishing its affirmative defense, is affirmed.

### CONCLUSION

Accordingly, the complaint in this matter is hereby **DENIED**.

**SO ORDERED.**

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<sup>7</sup> Given the unusual facts of this particular case, it is helpful to clarify that the ALJ concluded that the Complainant had engaged in some poorly specified protected activity. All parties agreed that Complainant had been hired with job duties that, on their face, would include a considerable component of protected activity. However, the ALJ also concluded that Respondent had demonstrated, by clear and convincing evidence, that Complainant's performance of her job duties was incompetent and that Respondent would have terminated Complainant irrespective of any protected activity. We affirm the ALJ's finding that Complainant's job description was separable from her actual job performance and that the distinction supports the result in this appeal.

<sup>8</sup> See, e.g., *Knox v. Nat'l Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 5 (ARB Apr. 30, 2012).

<sup>9</sup> The ALJ left open the record for Complainant to submit documents that would allow for the calculation of damages in the event he awarded damages. Hearing Transcript at 267. Complainant submitted documents post-hearing. Brief of Complainant. On appeal, Complainant argues that the ALJ erred by not addressing these documents. As we affirm the ALJ's conclusion that the Respondent established by clear and convincing evidence that it would have discharged Complainant in the absence of her protected activity, however, we need not address Complainant's contention.