



In the Matter of:

CRAIG WATTS,

ARB CASE NO. 2017-0017

COMPLAINANT,

ALJ CASE NO. 2016-FDA-00003

v.

DATE: May 28, 2020

PERDUE FARMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Thad M. Guyer, Esq.; Stephani L. Ayers, Esq.; *T.M. Guyer & Friends, PC*, Medford, Oregon; Karen Gray, Esq., *Government Accountability Project, Inc.*, Washington, District of Columbia

For the Respondent:

Todd J. Horn, Esq.; Mitchell Y. Mirviss, Esq.; Roger A. Colaizzi, Esq.; Todd A. Harrison, Esq.; and Stephen R. Freeland, Esq.; *Venable LLP*, Washington, District of Columbia

For the U.S. Food and Drug Administration as Amicus Curiae:

Michael D. Helbing, Esq.; Carolyn V. Jasperse, Esq.; and Nicole L. Pepperl, Esq.; *Food and Drug Administration, United States Department of Health and Human Services*, Washington, District of Columbia

For the Rural Advancement Foundation International-USA, Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America, and Farm and Ranch Freedom Alliance as Amici Curiae:

Candace A. Spencer, Esq., Washington, District of Columbia

For the U.S. Poultry & Egg Association & National Chicken Council as Amici Curiae:

J. Larry Stine, Esq.; Elizabeth K. Dorminey, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, PC, Atlanta, Georgia

BEFORE: Thomas H. Burrell, Acting Chief Administrative Appeals Judge and Heather C. Leslie Administrative Appeals Judge

DECISION AND ORDER GRANTING RECONSIDERATION AND REMANDING TO THE ADMINISTRATIVE LAW JUDGE

This case arises under the employee protection provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by Section 402 of the Food Safety and Modernization Act of 2011 (FSMA),¹ and its implementing regulations at 29 C.F.R. § 1987 (2016). Section 402 of the FSMA protects from retaliation 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. Craig Watts, the owner of C&A Farms, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Perdue Farms, Inc. (Perdue) retaliated against him for engaging in FSMA-related protected activities. OSHA dismissed the claim. Watts asked for a hearing, and the Administrative Law Judge (ALJ) assigned to the case also dismissed the claim. The ARB affirmed the ALJ's decision on March 5, 2019. Watts appealed the case to the United States Court of Appeals for the Fourth Circuit. On September 24, 2019, the Department of Labor moved that the Court remand the matter back to the ARB for additional consideration in light of briefing from the U.S. Food and Drug Administration (FDA). The Fourth Circuit granted that motion on January 7, 2020. *Watts v. U.S. Dept. of Labor*, Case No. 19-1487 (4th Cir. Jan. 7, 2020). Upon further briefing, the ARB vacates its March 5, 2019 Order and remands the matter back to the ALJ for further proceedings.

BACKGROUND

Craig Watts contracted with Perdue Farms, Inc., to raise chickens which he received from Perdue as chicks. After a period of several weeks, Perdue would then collect them for processing. Watts claims that the flocks raised on his farm follow Perdue's specifications but suffer from overcrowdedness and improper hygiene. Watts, with a third-party, recorded a video to illustrate conditions of his flock.

¹ Section 402 of the FSMA is codified at 21 U.S.C. § 399d (2016); The FFDCA is codified at 21 U.S.C. § 301 *et seq.* (1938).

Perdue counters that Watts wanted more money, became disgruntled, and kept sick and injured chickens alive to smear Perdue's reputation. Upon learning of the video, Perdue required Watts to complete biosecurity training before a new flock would be placed with his farm. On February 19, 2015, Watts filed a whistleblower complaint claiming that the additional training requirement was retaliation for having produced the film and complained of alleged violations.

On February 8, 2016, OSHA determined that Perdue was covered under FSMA but also that Watts was not an employee of Perdue. Watts objected, and the case was assigned to an ALJ for hearing. Before the ALJ, Perdue moved to dismiss for lack of subject matter jurisdiction. The ALJ agreed and held that he lacked jurisdiction to hear Watts's claim because Watts raised chickens for Perdue. Being part of the poultry products industry, Perdue's chicken business was exempt from the FFDCIA via the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 451, and thus exempt from the FSMA amendments adding the whistleblower protection provision to the FFDCIA. Watts appealed to the Administrative Review Board (ARB or Board). The ARB affirmed the ALJ's decision on March 5, 2019, finding that Perdue was not covered under the FFDCIA. Watts appealed the ARB's decision to the Fourth Circuit. Upon further briefing, the Fourth Circuit granted DOL's motion for voluntary remand back to the ARB for further consideration. This Order of Remand follows.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions for the Department of Labor in cases brought under the FSMA.² The ARB reviews an ALJ's dismissal *de novo*, applying the same standard that the ALJ employed under 29 C.F.R. Part 18 (2017). Pursuant to 29 C.F.R. § 18.70, the ALJ dismissed Watts's appeal for lack of subject matter jurisdiction.³ In assessing this dismissal, we view the pleadings in a light favorable to the complainant, accepting well pled factual allegations as true provided they rise above the speculative level. The ARB does not, however, accept conclusions of law or unwarranted inferences which are presented as fact.

DISCUSSION

The FFDCIA authorizes the FDA to regulate the safety of food in interstate commerce. 21 U.S.C. §§ 301 *et seq.* Chapter 9 of the FFDCIA regulates food safety

² Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186 (Mar. 6, 2020).

³ Rule 18.70 compares with Federal Rule of Civil Procedure 12(b). We note that parties often interchange "subject matter jurisdiction" with claim-processing rules. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503-08 (2006).

from the time it is imported, manufactured, or processed until it is packaged and distributed for public consumption. On January 4, 2011, Congress enacted the Food Safety Modernization Act to add employee protection to the FFDCA.⁴ Section 402 of the FSMA provides that:

(a) In general

No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)--

(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 this chapter or any order, rule, regulation, standard, or ban under this chapter, or any order, rule, regulation, standard, or ban under this chapter; . . .

21 U.S.C. § 399d(a). For purposes of this discussion, § 399d's relevant coverage language provides:

No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food

“Food” is the operative word that conveys the whistleblower provision's coverage. “Food” is defined in the FFDCA:

(f) The term “food” means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

21 U.S.C. § 321(f); see also 29 C.F.R. § 1987.101(h) (implementing regulation containing identical language).

⁴ Pub. L. 111-353, 124 Stat. 3885 (Jan. 4, 2011).

Congress enacted the PPIA to protect the public from “unwholesome, adulterated, or misbranded” poultry products. 21 U.S.C. § 451 *et seq.* (1968). Section 467f of the PPIA generally exempts poultry and poultry products from the FFDCFA.

(a) Exemptions; authorities under food, drug, and cosmetic provisions unaffected:

Poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 *et seq.*] to the extent of the application or extension thereto of the provisions of this chapter, except that the provisions of this chapter shall not derogate from any authority conferred by the Federal Food, Drug, and Cosmetic Act prior to August 18, 1968. . . .

21 U.S.C. § 467f(a). Furthermore, Section 403 of the FSMA provides that:

Nothing in [the FSMA], or an amendment made by this Act, shall be construed to—

...

(4) alter or limit the authority of the Secretary of Agriculture under the laws administered by such Secretary, including---

...

(B) the Poultry Products Inspection act...

21 U.S.C. § 2251.

If the PPIA covers the employer’s poultry activity at issue, then the activity is exempt from the FFDCFA. FDA argues that the PPIA does not kick in to exempt poultry from the FFDCFA until the poultry arrives at an *official establishment*, meaning a slaughterhouse or processing facility.⁵ Because the PPIA does not apply to on-farm poultry, FDA argues that poultry is still “food” and covered by the FFDCFA. FDA identifies, for example, its regulation of edible tissues of food-producing animals that contain unsafe levels of animal drugs, causing the food to be adulterated. FDA also notes that Perdue supplies the feed, fuel, medications, vaccinations, and other supplies for the chicks on Watts’s farm. FDA claims that there is no question that animal feed is covered as food under the FDCA. FDA Br. at 23, citing § 321(f).

⁵ FDA Br. at 6. “Official establishment’ means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this chapter.” 21 U.S.C. § 453(p).

Upon further briefing, we grant the request to reconsider our March 5, 2019 ruling. The question before the Board is whether Perdue is an “entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 21 U.S.C. § 321(f).⁶ FDA argues and Perdue does not dispute that Perdue supplied the poultry animal feed for poultry on Watts’s farm. Accordingly, Perdue is an entity who manufactures, process, transports, or distributes “food” within the meaning of the Act and thus is a covered entity.

In conclusion, the ARB **VACATES** its March 5, 2019 Order affirming the ALJ’s decision and **REMANDS** the matter back to the ALJ for further proceedings.

SO ORDERED.

⁶ As this is the sole issue before the Board, we decline to address any other arguments on appeal.