In the Matter of:

CRAIG WATTS, **ARB CASE NO. 2017-0017**

COMPLAINANT, **ALJ CASE NO. 2016-FDA-00003**

v. **DATE: March 5, 2019**

PERDUE FARMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thad M. Guyer, 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.; and Michael J. Wilson, Esq.; *Venable LLP*; Baltimore, Maryland; John F. Cooney, Esq.; and Stephen R. Freeland, Esq.; *Venable LLP*, Washington, District of Columbia

For the U.S. Poultry & Egg Association & National Chicken Council as Amicus Curiae:
J. Larry Stine, Esq.; *Wimberly, Lawson, Steckel, Schneider & Stine, PC*; Atlanta, Georgia

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA),[1] as amended by Section 402 of the Food Safety and Modernization Act of 2011 (FSMA),[2] and its implementing regulations at 29 C.F.R. § 1987 (2018). 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. 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 complaint, and Watts asked for a hearing before an Administrative Law Judge (ALJ). Upon motion by Respondent, the ALJ also dismissed the complaint. For the reasons stated below, we affirm.

BACKGROUND

Craig Watts contracted with Perdue Farms, Inc., to raise chickens in North Carolina which he received from Perdue as chicks.[3] After a period of several weeks, Perdue would then collect them for processing.[4] In 2014, Watts made allegations that Perdue had misinformed consumers about the practices farmers used in raising its chickens and the health of its chickens in violation of the FSMA and the FFDCA.[5] On February 19, 2015, Watts filed a whistleblower complaint alleging that Perdue retaliated against him for making such allegations in violation of the employee protection provisions of the FSMA.[6]

On February 8, 2016, OSHA determined that, while Perdue was covered under the FSMA, Watts was not a covered employee of Perdue under the FSMA.[7] Watts requested a hearing before an ALJ. Before the ALJ, Perdue filed a motion to dismiss for lack of subject matter jurisdiction. The ALJ granted Perdue's motion to dismiss pursuant to 29 C.F.R. § 18.70(a), concluding that she lacked jurisdiction to hear Watts's claim.[8] Specifically, the ALJ

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1 21 U.S.C. § 301 et seq. (1938).

2 21 U.S.C. § 399d (2016).

3 Decision and Order Granting Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction (D. & O.) at 1, 6.

4 *Id.*

5 *Id*. at 1.

6 *Id*. at 1-2.

7 *Id.* at 2.

8 20 C.F.R. § 18.70 encompasses the bases for dismissal announced in Rule 12(b) of the Federal Rules of Civil Procedure. We note that judges and parties often use the term "subject matter jurisdiction"

reasoned that the raising of chickens is part of the poultry products industry, which is exempt from the FFDCA pursuant to the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 467f (1979), and is therefore also exempt from the FSMA amendments adding the employee protection provisions to the FFDCA. Watts appealed this decision to the Administrative Review Board (ARB or Board).

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 (DOL).[9] In cases arising under the FSMA, "[t]he ARB will review the factual determinations of the ALJ under the substantial evidence standard." 20 C.F.R. § 1987.110(b). The ARB reviews an ALJ's conclusions of law de novo.[10]

DISCUSSION

A. Statutory and Regulatory Background

We must determine whether the ALJ erred in her conclusion of law that the U.S. Department of Labor does not have jurisdiction to adjudicate this complaint. The statutory framework is complex, involving four distinct statutes, and requires some explanation to fully understand the context of this case.

The FFDCA authorizes the Food and Drug Administration (FDA) to regulate the safety of food in interstate commerce. 21 U.S.C. § 301 et seq. Chapter 9 of the FFDCA regulates food safety from the time it is imported, manufactured, or processed until it is packaged and distributed for public consumption. *Id*.

On January 4, 2011, Congress enacted the FSMA to amend the FFDCA and add employee protections.[11] Section 402 of the FSMA, 21 U.S.C. § 399d(a), provides that the following:

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for what might more properly be denoted as a pleadings- or merits-based determination. *See Arbaugh v. Y&H Corp*., 546 U.S. 500, 510 (2006).

[9] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1987.110(a).

[10] *Brousil v. BNSF Railway Co*., ARB Nos. 16-025, 16-031, ALJ No. 2014-FRS-163, slip op. at 3 (ARB July 9, 2018).

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

> (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) (emphasis added). "Food" is the operative word that conveys the whistleblower provision's coverage. "Food" is defined in the FFDCA as:

> 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). Similarly, the FSMA's implementing regulations restate the definition without substantive change:

> *Food* means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article.

29 C.F.R. § 1987.101(h).

While "food" is a broad category of articles and things, Congress has chosen to limit the FFDCA's coverage of food. It enacted the PPIA to protect the public from "unwholesome, adulterated, or misbranded" poultry products. 21 U.S.C. § 451 (1968). The PPIA generally exempts poultry and poultry products from the FFDCA:

> 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); *see also* 21 U.S.C. §§ 350c(d)(2), 381(m)(3)(B) (limiting poultry from the respective FFDCA obligations and duties). Furthermore, Section 403 of the FSMA, 21 U.S.C. § 2251, specifically addresses the relationship between the two Acts:

> 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. Accordingly, the FFDCA's definition of "food" may be broad, but the PPIA and FSMA unequivocally establish that "poultry" is not "food" for the purposes of the FFDCA. There is no overlap of coverage in this particular regard, and the ALJ was correct as a matter of law to conclude that she had no authority to adjudicate a complaint arising under a statute, i.e., the PPIA, that is not administered by the Department of Labor.

B. Watts's Further Argument

Watts also argues that even if the PPIA excludes "poultry" from coverage under the FFDCA, the DOL is still a proper forum for his complaint because Watts had a reasonable belief that he and his employer were covered under the FFDCA and the FSMA. The FSMA's implementing regulations provide that the FSMA protects an employee who has done the following:

> 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 [FFDCA] or any order, rule, regulation, standard, or ban under the [FFDCA];

29 C.F.R. § 1987.102(b)(1). Watts cites *Saporito v. Publix Super Markets, Inc.*, ARB No. 10-073, ALJ No. 2010-CPS-001 (ARB Mar. 28, 2012), for support. In *Saporito*, a panel of the Board held that it was error to dismiss a complaint of retaliation under the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087 (2008), because the ALJ erroneously concluded that the actions complained of involved categories of products excluded from the coverage of the CPSIA. The Board noted that the employee protection provision of the CPSIA was not limited to acts or omissions that violated the CPSIA, but also extended to violations of "any Act regulated by the [Consumer Products Safety] Commission, or any order, rule, regulation, standard, or ban under such Acts." The Board identified two such Acts that the Commission also regulated that may have been implicated by the actions Saporito complained of, and concluded that "[t]his factor alone is a sufficient basis to reverse and remand this matter to the ALJ." *Saporito*, ARB No. 10-073, slip op. at 5. In subsequent dicta, the Board noted that the ALJ had also erroneously failed to consider the effect of Saporito's potentially mistaken

belief that the actions at issue were violations of the CPSIA. The Board observed that "[t]he CPSIA's plain language allows the complainant to be wrong as long as he held a reasonable belief of a violation of the Act or other act enforced by the Commission." *Saporito*, ARB No. 10-073, slip op. at 6.

C. Analysis

Watts' reliance upon *Saporito* is misplaced for several reasons. As a threshold matter, the statutory framework in *Saporito* is distinguishable from that in the instant case. Whereas the CPSIA extended whistleblower protection to allegations of violations of any legislative act the Consumer Product Safety Commission regulated, in this matter the FFDCA and the FSMA extend such protection only to allegations of violations of the FFDCA. *See* 21 U.S.C. § 399d(a). And while the ALJ in *Saporito* erred by ignoring statutory language that resulted in a constrained reading of the reach of the Act's coverage at issue in that case, in this case Watts would have the Board expand the reach of the FFDCA and the FSMA to an entity neither Act covers on the basis of Complainant's mistake of law. By doing so, Watts conflates the standard of analysis for determining whether protected activity is established based on a complainant's "reasonable belief" with the different analysis for determining whether a respondent's activities are covered under the FSMA. A complainant's reasonable but mistaken belief that a FFDCA violation has occurred may render certain of his whistleblowing activities as protected under the Act. But an employee's reasonable albeit mistaken belief that poultry is regulated under the FFDCA and the FSMA cannot operate to extend coverage of those Acts over an entity whose activities the Acts do not otherwise regulate. Complainant's reasonable mistake of law may expand the protections that his whistleblowing activities receive, but it cannot extend the coverage of an Act beyond that which Congress expressly provided for in the statutory text.

In conclusion, Watts has failed to show that the ALJ erred in dismissing his complaint. *Cf. Nortell v. North Central College*, ARB No. 16-071, ALJ No. 2016-SOX-013, slip op. at 4-5 (ARB Feb. 12, 2018); *Fleszar v. Am. Med. Ass'n,* ARB Nos. 07-091, 08-061, ALJ Nos. 2007-SOX-030, 2008-SOX-016, slip op. at 4 (ARB Mar. 31, 2009). For the reasons stated above, we hold that the ALJ's decision was correct in law and fact. Accordingly, we **AFFIRM** the ALJ's dismissal of this complaint.

SO ORDERED.