



Via UPS

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March 13, 2023

Kevin S. Wiley, Jr., Esq.
Hicks Law Group
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Dallas, TX 75201
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Re: New Mount Zion Baptist Church / [REDACTED]

Dear Mr. Wiley:

This is to advise you that we have completed our investigation of the above-referenced complaint filed on September 14, 2021 by [REDACTED] (Complainant) against New Mount Zion Baptist Church (Respondent) pursuant to Section 11(c) of the OSH Act, 29 U.S.C. §660 and Section 402 of the FDA Food Safety Modernization Act (FSMA), 21 U.S.C. 399d. In brief, Complainant alleges that Respondent discharged him in retaliation for raising food safety issues with management due to infestations of rodents, insects, and spiders in food preparation areas at the childcare facility that worsened by a nonfunctional air-conditioner.

Following an investigation by a duly-authorized Investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VI, finds that there is reasonable cause to believe that Respondent violated FSMA and issues the following findings:

Secretary's Findings

Timeliness of the Complaint:

On September 24, 2021, Complainant, filed a complaint with the Secretary of Labor alleging Respondent, New Mount Zion Baptist Church, retaliated against him in violation of Section 11(c) of the OSH Act, 29 U.S.C. §660 and Section 402 of the FDA Food Safety Modernization Act (FSMA), 21 U.S.C. 399d when Respondent discharged him on August 27, 2021, because he reported to Center Director, [REDACTED], Assistant Center Director [REDACTED] and the Dallas County Health Department (DCHD) the insect and rat infestations and a broken air conditioner in the kitchen and cafeteria of the daycare. Since a Complainant has 180 days to file a complaint under the FSMA, the instant complaint is timely filed.¹

¹ The complaint was also timely filed under Section 11(c) of the Occupational Safety & Health Act as it was filed within 30 days of the alleged adverse action.

Coverage:

Respondent is a covered entity as it is engaged in the processing, reception, and holding of food, within the meaning of 21 U.S.C. § 399d(a). At Respondent's facility, there is a daycare with a kitchen and cafeteria that serves meals to children and thus is used to hold, receive and process food as defined by the Federal Food, Drug, and Cosmetic Act. The Complainant was an employee within the meaning of 21 U.S.C. § 399d(a). In the course of his employment, Complainant worked as a Nutrition Specialist.² The complainant's job duties included storing, processing, and serving food to the clients of the Respondent's daycare center.

Findings of the investigation:

Respondent hired Complainant as a Nutrition Specialist starting on May 5, 2021. The complainant had a base salary of \$560.00 per 40-hour work week, without benefits and overtime.

On or around May 24, 2021, Complainant began seeing insects and spiders inside the childcare facility primarily in the cafeteria, kitchen, and front foyer area. As Complainant believed these conditions could compromise food safety, Complainant reported his concerns about the infestations of rodents, insects and spiders to the Daycare Center Director [REDACTED].

Then, on or around May 31, 2021, the air conditioning unit for the daycare stopped working and Complainant reported the issue to [REDACTED], who advised it would be fixed. However, the air conditioner did not function until early July. As such, temperatures were very high in the kitchen and cafeteria during the hot Texas summer and jeopardized food safety and health.

Despite positive feedback for his work and no disciplinary actions, shortly after Complainant began reporting food safety concerns, Complainant was issued two incident/observation letters.

First, on June 16, 2021, after Complainant had raised his concerns about the insects and spiders infestation and nonfunctioning air conditioner, [REDACTED] issued an incident/observation letter to Complainant for a dress code violation alleging that the length of the Complainant's pants he wore was above the knee. Complainant denied wearing shorts, stating that he wore pants that extended below the knee. Most notably, at the time the incident/observation letter was issued, Respondent did not have a written dress code policy for male employees. At the time, [REDACTED] and Board Secretary [REDACTED] Respondent admitted to Complainant that no such dress code policy existed.

Second, on June 28, 2021, Assistant Church Administrator [REDACTED] observed Complainant laying on a couch in the Director's Office and issued an incident/observation letter.

On July 6, 2021, while the air conditioning unit was finally being repaired, Complainant discovered an infestation of rats, roaches, and the presence of rat feces in the kitchen. The following day, Complainant reported the insect and vermin infestations to [REDACTED], who in turn reported it to [REDACTED] to schedule exterminators. Assistant Center Director [REDACTED] advised [REDACTED] that Terminix had treated the facility. The complainant was aware that other staff

² Complainant's job description was entitled "Cook."

had seen the rats and he, therefore, began to clean and sanitize the cooking area multiple times per day to ensure a safe food preparation environment for staff and children. [REDACTED] resigned on August 24, 2021.

On August 26, 2021, Complainant discovered another rat infestation in the cafeteria near the children's sleeping cots. Complainant took pictures to document the infestation, and then called the DCHD and reported the presence of rats, spiders, insects, and rat feces in the kitchen and cafeteria near the children's sleeping area.

On August 26, 2021, at around noon, [REDACTED] received a call from Assistant Center Director [REDACTED] informing him that she had received a call from the DCHD about an anonymous complaint of an infestation of rats, spiders, and mosquitos at the daycare and that DCHD inspectors were en route to conduct an inspection of the facilities. At around 1:00 pm on the same day, [REDACTED] was notified that a Health Inspector had arrived at the daycare. DCHD inspected the kitchen, cafeteria, and each classroom, however, they were unable to substantiate the complaint items.

On August 26, 2021, *after* the DCHD notified the Respondent of the complaint, the Respondent held a special board meeting and discussed Complainant and his complaint to the DCHD. Specifically, Assistant Administrator [REDACTED] raised these issues and then discussed terminating Complainant's employment. The board voted to end the Complainant's employment effective August 27, 2021. [REDACTED] called [REDACTED] and daycare board president, [REDACTED] informing him the board had elected to discharge the Complainant.

On August 27, 2021, around 7:45 am, [REDACTED] and Assistant Center Director [REDACTED] met with Complainant in the parking lot and informed him of the Board's decision to discharge him.

Complainant engaged in protected activity several times before his termination when he raised concerns to his supervisor about the presence of insects and rats, and the air conditioner in the food preparation areas and on the day before his termination when he made a report about the same to DCHD on August 26, 2021, establishing a close temporal proximity between the protected activities and the adverse action.

Respondent was aware of Complainant's complaints about the presence of insects and rats and a nonfunctional air conditioner in the food preparation area. Respondent was notified on the day of Complainant's termination about the contents of the complaint made to DCHD, which were the same as the complaints he had made to management.

Notably, Complainant's protected activity *and* termination were discussed in the same board meeting on August 26, 2021.

Respondent claimed it discharged Complainant because he exhibited disrespectful behavior to his fellow employees and had an insubordinate attitude towards his superiors. Specifically, Respondent points to an instance in which Complainant failed to greet the pastor's wife. These stated reasons are not supported by the evidence and are not clear and convincing evidence that Respondent would have discharged Complainant absent his protected activity.

The investigation revealed that Complainant, raised concerns about rodents, insects, spiders, and rodent droppings being in the food preparation areas and that the air-conditioner was not working. Respondent admitted that it was aware of these complaints. Instead of taking steps to address these food safety and health concerns, Respondent fired Complainant in an attempt to silence him and to send a message to other employees not to complain. This illegal behavior creates a chilling effect across the workforce. Respondent intentionally and callously disregarded Complainant's federally protected rights under the FSMA.

Complainant is entitled to preliminary reinstatement, back pay with interest, and compensatory damages under FSMA, 21 U.S.C. § 399d.³ Complainant suffered personal humiliation, mental anguish, and emotional and financial distress when the Respondent terminated his employment. Specifically, Complainant suffered financial hardship and humiliation because of his discharge and was forced to borrow \$2,725 in loans from friends and family. Complainant had to borrow money from friends and family to survive until he found a job, albeit, a lower paying job, in November of 2021.

PRELIMINARY ORDER

1. Upon receipt of this Secretary's Finding and Order, Respondent shall immediately reinstate Complainant to his former position at the rate of \$14.70 per hour. Such reinstatement shall include all rights, seniority, raises, and benefits that Complainant would have enjoyed had he never been discharged. Such reinstatement is not stayed by an objection to this order.
2. Respondent shall pay Complainant back pay plus interest in the amount of \$11,369.76 as of March 11, 2023 and shall pay Complainant additional back pay at the rate of \$588.40 per week (minus interim earnings) until Respondent makes Complainant a bona fide offer of reinstatement.
3. Interest on the back pay award, compounded daily, shall continue to accrue in accordance with FSMA, 21 U.S.C. § 399d until the Respondent makes payment.
4. Respondent shall pay Complainant additional damages in the amount of \$20,000 for the for pain and suffering, including emotional, financial, and mental distress.
5. Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under FSMA, 21 U.S.C. § 399d.
6. Respondent shall make no negative references relating to the facts and circumstances of this complaint to any prospective future employers.
7. Respondent shall not retaliate or discriminate against Complainant in any manner for

³ OSHA is deferring the Section 11(c) complaint and issuing findings under FSMA. See 29 CFR 1977.18.

instituting or causing to be instituted any proceeding under or related to FSMA, 21 U.S.C. § 399d.

8. Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal website for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of posting, the attached Notice to Employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.
9. Respondent shall issue all current employees a copy of the attached OSHA Fact Sheet DWPP FS-3638 "OSHA's Whistleblower Protection Program."

Either party has 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with the Office of Administrative Law Judges:

Primary method - via email to: OALJ-Filings@dol.gov
Secondary method (if unable to file via email) - via hard copy submission to
Chief Administrative Law Judge - Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Telephone: (202) 693-7300; Fax: (202) 693-7365

With copies to:

All parties to this complaint.

Primary method - via email to: R6.11c.OSHA@dol.gov
Secondary method (if unable to file via email) - via hard copy submission to
Regional Administrator
U.S. Department of Labor-OSHA
525 S. Griffin Street, Room 602
Dallas, TX 75202

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence de novo for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. A review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FSMA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a

copy of the complaint. The rules and procedures for the handling of FSMA cases can be found in Title 29 CFR Code of Federal Regulations Part 1987 and may be obtained at www.whistleblowers.gov.

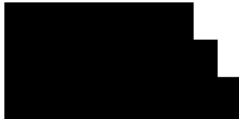
Sincerely,



Michael Mabee
Assistant Regional Administrator – Whistleblower Programs
Region 6 – Dallas, TX

Attachments.

cc: James E. Hunnicutt, Esq.
Jennifer J. Spencer, Esq.
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NOTICE TO EMPLOYEES



**PURSUANT TO AN ORDER
OF THE U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION**



New Mount Zion Baptist Church (“the employer”) agrees that it will not 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 Act or any order, rule, regulation, standard, or ban under this Act, or any order, rule, regulation, standard, or ban under this Act;
- (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 this Act, or any order, rule, regulation, standard, or ban under this Act.

New Mount Zion Baptist Church

Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM
THE DATE OF POSTING AND MUST BE NOT ALTERED, DEFACED, OR
COVERED BY OTHER MATERIAL.**

OSHA's Whistleblower Protection Program

OSHA's Whistleblower Protection Program enforces the provisions of more than 20 federal laws protecting employees from retaliation for, among other things, raising or reporting concerns about hazards or violations of various workplace safety and health, aviation safety, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. Employees who believe that they have experienced retaliation in violation of one of these laws may file a complaint with OSHA.

Whistleblower Laws Enforced by OSHA

Following is a list of statutes over which OSHA has jurisdiction. Each statute has a different time frame in which a complaint can be filed.

- *Asbestos Hazard Emergency Response Act (90 days)*
- *Clean Air Act (30 days)*
- *Comprehensive Environmental Response, Compensation and Liability Act (30 days)*
- *Consumer Financial Protection Act of 2010 (180 days)*
- *Consumer Product Safety Improvement Act (180 days)*
- *Energy Reorganization Act (180 days)*
- *Federal Railroad Safety Act (180 days)*
- *Federal Water Pollution Control Act (30 days)*
- *International Safe Container Act (60 days)*
- *Moving Ahead for Progress in the 21st Century Act (motor vehicle safety) (180 days)*
- *National Transit Systems Security Act (180 days)*
- *Occupational Safety and Health Act (OSH Act) (30 days)*
- *Pipeline Safety Improvement Act (180 days)*
- *Safe Drinking Water Act (30 days)*
- *Sarbanes-Oxley Act (180 days)*
- *Seaman's Protection Act (180 days)*
- *Section 402 of the FDA Food Safety Modernization Act (180 days)*
- *Section 1558 of the Affordable Care Act (180 days)*
- *Solid Waste Disposal Act (30 days)*
- *Surface Transportation Assistance Act (180 days)*
- *Toxic Substances Control Act (30 days)*
- *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (90 days)*

What Is Retaliation?

Retaliation is an adverse action against an employee because of activity protected by one of these whistleblower laws. Retaliation can include several types of actions, such as:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Reassignment affecting promotion prospects
- Reducing pay or hours
- Making threats

Filing a Complaint

Employees who believe that their employers retaliated against them because they engaged in protected activity should contact OSHA as soon as possible because they must file any complaint within the legal time limits.

An employee can file a complaint with OSHA by visiting or calling his or her local OSHA office, sending a written complaint to the closest OSHA office, or filing a complaint online. No particular form is required and complaints may be submitted in any language.

Written complaints may be filed by fax, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

The date of the postmark, fax, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is considered the date filed.

To file a complaint electronically, please visit: www.osha.gov/whistleblower/WBComplaint.html.

To contact an OSHA area office, employees should call 1-800-321-OSHA (6742) to be connected to the closest area office or visit www.osha.gov/html/RAMap.html to find local OSHA office address and contact information.

When OSHA receives a complaint, OSHA will first review it to determine whether certain basic requirements are met, such as whether the complaint was filed on time. If so, the complaint will be investigated in order to determine whether the employer retaliated against the employee for engaging in activity protected under one of OSHA's whistleblower laws. OSHA may also attempt to assist the employer and employee in reaching a settlement of the case.

Private-sector employees throughout the United States and its territories and employees of the United States Postal Service (USPS) who suffer retaliation because of occupational safety or health activity are covered by section 11(c) of the OSH Act. In addition, private-sector employees are also covered by laws in States which operate their own comprehensive occupational safety and health programs approved by Federal OSHA ("State Plans"). For information on the whistleblower provisions of the 22 State Plan States which cover private-sector employees, visit www.osha.gov/dcsp/osp.

With the exception of employees of the USPS, public-sector employees (those employed as municipal, county, state, territorial, or federal workers) are not covered by the OSH Act. State and local government employees are covered by the whistleblower provisions of all the States with State Plans, including six States which cover only State and local government employees.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

A federal employee who is not a USPS employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving a violation of an occupational safety or health standard or regulation should contact the Office of Special Counsel (www.osc.gov). Such federal employees are also covered by their own agency's procedures for remedying such retaliation.

Public-sector employees who are unsure whether they are covered under a whistleblower law should call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

Results of the Investigation

If OSHA determines that retaliation in violation of the OSH Act, *Asbestos Hazard Emergency Response Act*, or the *International Safe Container Act* has occurred, the Secretary of Labor may sue in federal district court to obtain relief. If OSHA determines that no retaliation has occurred, it will dismiss the complaint.

Under the remaining whistleblower laws, if the evidence supports an employee's complaint of retaliation, OSHA will issue an order requiring the employer, as appropriate, to put the employee back to work, pay lost wages, and provide other possible relief. If the evidence does not support the employee's complaint, OSHA will dismiss the complaint. After OSHA issues a decision, the employer and/or the employee may request a full hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision may be appealed to the Department's Administrative Review Board.

Under some of the laws, an employee may file the retaliation complaint in federal district court if the Department has not issued a final decision within a specified number of days (180, 210 or 365 depending on the law).

To Get Further Information

To obtain more information on whistleblower laws, go to www.whistleblowers.gov.



U.S. Department of Labor



DWPP FS-3638 04/2018