U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

APR 20 2015

MEMORANDUM FOR: **REGIONAL ADMINISTRATORS**
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: **DOROTHY DOUGHERTY** Theresa Clark for
Deputy Assistant Secretary

JORDAN BARAB
Deputy Assistant Secretary

FROM: **ERIC S. HARBIN, ACTING DIRECTOR**
Directorate of Whistleblower Protection Programs

SUBJECT: **Clarification of the Investigative Standard for OSHA Whistleblower Investigations**

Under the whistleblower statutes administered by the Occupational Safety and Health Administration (OSHA), a case is initiated when OSHA receives a complaint alleging unlawful retaliation. If OSHA's initial inquiry shows that the complainant has alleged the existence of facts and evidence sufficient to make a prima facie showing of retaliation, OSHA then conducts an investigation to determine whether the complaint has merit. The Directorate of Whistleblower Protection Programs (DWPP) is issuing this memorandum to clarify the investigative standards for OSHA's whistleblower investigations.[1]

I. The Standard that Applies to OSHA Whistleblower Investigations is Whether OSHA Has Reasonable Cause to Believe a Violation Occurred.

Many of the statutes that OSHA administers state that the Secretary "shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit."[2] The Surface Transportation Assistance Act (STAA) and Seaman's Protection Act

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[1] Chapters 3.V and 3.VI of OSHA's Whistleblower Investigations Manual are ambiguous in this regard. OSHA will make appropriate revisions to the manual when it next revises that chapter.

[2] *See* The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b)(2)(A); Sarbanes Oxley Act (SOX), 18 U.S.C. § 1514A; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Affordable Care Act (ACA), 29 U.S.C. § 218C; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank

(SPA) contain a nearly identical provision, but describe the investigative standard as "whether it is reasonable to believe the complaint has merit."[3] Although the Energy Reorganization Act (ERA) and the six environmental whistleblower statutes do not provide an investigative standard,[4] OSHA's regulations state that the reasonable cause standard applies for determining whether to issue written merit findings. 29 C.F.R. § 24.105(a)(1). Thus, for all of the statutes in which cases are heard by an Administrative Law Judge (ALJ) following OSHA's investigation, OSHA issues merit findings when there is reasonable cause to believe that a violation of the relevant whistleblower statute has occurred.

Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651, and the International Safe Container Act (ISCA), 46 U.S.C. § 80507, do not explicitly state an investigative standard but rather provide that if the Secretary determines there has been a violation, the Secretary may bring an action in district court. Under those statutes, when OSHA believes that there may be reasonable cause to believe that a violation occurred, OSHA should consult informally with the Regional Solicitor's Office ("RSOL"), if it has not already done so, to ensure that the investigation captures as much relevant information as possible so that the RSOL can evaluate whether it is likely to prevail in a district court action under the preponderance of the evidence standard that the court will apply. In cases that the RSOL litigates in district court, greater fact finding by OSHA and the RSOL may be necessary to determine whether a case is suitable for litigation. The ultimate responsibility for determining whether a case is suitable for litigation rests with the RSOL.

II. The "Reasonable Cause" Standard Supports a Merit Determination if a Reasonable Judge Could Find that a Violation Occurred.

Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause standard is somewhat lower than the preponderance of the evidence standard that applies following a hearing.[5] The threshold OSHA must meet to find reasonable cause that a complaint has merit requires evidence in support of each element of a violation and consideration of the

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Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567; FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; and Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171. OSHA's regulations under these whistleblower statutes incorporate the same language. *See, e.g.*, 29 C.F.R. § 1979.105.

[3] 49 U.S.C. § 31105(b)(2)(A); 46 U.S.C. § 2114(b).

[4] *See* ERA, 42 U.S.C. § 5851, Clean Air Act (CAA), 42 U.S.C. § 7622, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j- 9(i); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622.

[5] *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (plurality opinion) (noting that OSHA's responsibility to find reasonable cause is different from an ALJ's responsibility to conduct a final evaluation of the evidence and witness credibility following a hearing).

evidence provided by both sides during the investigation, but does not generally require as much evidence as would be required at trial.[6] Thus, after evaluating all of the evidence provided by the employer and the complainant, OSHA must believe that a reasonable judge could rule in favor of the complainant. Accordingly, OSHA's investigation must reach an objective conclusion – after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred. The evidence does not need to establish conclusively that a violation *did* occur.

OSHA's responsibility to determine whether there is reasonable cause to believe a violation occurred is greater than the complainant's initial burden to demonstrate a prima facie allegation that is enough to trigger the investigation.[7] However, a reasonable cause finding does not necessarily require as much evidence as would be required at trial to establish unlawful retaliation by a preponderance of the evidence. Although OSHA will need to make some credibility determinations to evaluate whether a reasonable judge could find in the complainant's favor, OSHA does not necessarily need to resolve all possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause to believe that a violation occurred.[8] Rather, when OSHA believes, after considering all of the evidence gathered during the investigation, that the complainant could succeed in proving a violation, it is appropriate to issue a merit finding under the statutes that provide for litigation before an ALJ ("administrative statutes"), or to consult informally with the RSOL in cases under the statutes that provide for district court litigation ("district court statutes").

III. OSHA's Findings Must Reference the Appropriate Standard.

OSHA's merit and non-merit findings under the administrative statutes should reference the reasonable cause standard, not the preponderance of the evidence standard that would apply to the claim at trial.[9] OSHA's dismissal findings under the district court statutes should state that

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[6] The elements of a violation are: (1) whether the complainant engaged in protected activity; (2) whether the employer took adverse action against the complainant; (3) whether the employer was aware of the complainant's protected activity at the time of the adverse action; and (4) whether a causal link existed between the complainant's protected activity and the adverse action.

[7] Under most of the whistleblower statutes, the complaint, supplemented as appropriate by interviews of the complainant, must simply allege the existence of facts and evidence sufficient to make a prima facie showing before OSHA will conduct an investigation. *See, e.g.*, 29 C.F.R. § 1979.104(b)(1). For example, under AIR21, "[t]he Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i).

[8] *See Roadway Express, Inc.*, 481 U.S. at 266 (1987) (plurality opinion) (noting that an OSHA investigator may not be in a position to determine the credibility of witnesses or confront all conflicting evidence, because the investigator does not have the benefit of a full hearing).

[9] The sample findings in the Whistleblower Investigations Manual correctly reference the reasonable cause standard at pp. 5-16 and 5-23.

the Secretary has determined that the complaint lacks merit or is not suitable for litigation and explain why.