

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****29 CFR Part 1979**

RIN 1218-AB99

Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century**AGENCY:** Occupational Safety and Health Administration, Labor.**ACTION:** Interim final rule; request for comments.

SUMMARY: This document provides the text of regulations governing the employee protection ("whistleblower") provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), a Federal Aviation Administration reauthorization bill, enacted into law April 5, 2000. This rule establishes procedures and time frames for the handling of complaints under AIR21, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration ("OSHA"), investigations by OSHA, appeals of OSHA determinations to an administrative law judge ("ALJ") for a hearing de novo, hearings by ALJs, appeal of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decision.

DATES: This interim final rule is effective on April 1, 2002. Comments on the interim final rule are due on or before May 31, 2002.

ADDRESSES: Submit written comments to: Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3468, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card or to submit them by certified mail, return receipt requested. As a convenience, comments may be transmitted by facsimile ("FAX") machine to (202) 693-1681. This is not a toll-free number. If commenters transmit comments by FAX and also submit a hard copy by mail, please indicate on the hard copy that it is a duplicate copy of the FAX transmission.

FOR FURTHER INFORMATION CONTACT: John Spear, Occupational Safety and Health Administration, U.S. Department of

Labor, Room N-3468, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2187. This is not a toll-free number. The alternative formats available are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION:**I. Background**

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), Public Law No. 106-181, was enacted on April 5, 2000. Section 519 of the Act, codified at 49 U.S.C. 42121, provides protection to employees against retaliation by air carriers, their contractors and their subcontractors, because they provided information to the employer or the federal government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other law relating to the safety of air carriers, or because they are about to take any of these actions. These rules establish procedures for the handling of complaints under AIR21. In drafting these regulations, consideration has been given to the whistleblower regulations of the Surface Transportation Assistance Act ("STAA"), codified at 29 CFR part 1978, and the Energy Reorganization Act ("ERA"), codified at 29 CFR part 24, where deemed appropriate.

II. Summary of Statutory Provisions

The AIR21 whistleblower provisions include procedures which allow a covered employee to file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor ("the Secretary").¹ Upon receipt of the complaint, the Secretary must provide written notice to both the person named in the complaint who is alleged to have violated the Act ("the named person") and the FAA of: The allegations contained in the complaint, the substance of the evidence submitted with the complaint, and the rights of the named person throughout the investigation. The Secretary must then, within 60 days of receipt of the

complaint, afford the named person an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation. However, the Secretary may conduct an investigation only if the complainant has made a *prima facie* showing that the alleged discriminatory behavior was a contributing factor in the unfavorable personnel action alleged in the complaint and the named person has not demonstrated, through clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior. This provision is similar to the 1992 amendments to the ERA, codified at 42 U.S.C. 5851.

After investigating a complaint, the Secretary shall issue a determination letter. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that discriminatory behavior has occurred, the Secretary must notify the named person of those findings along with a preliminary order which requires the named person to: Abate the violation, reinstate the complainant to his or her former position and provide make whole relief and compensatory damages to the complainant, as well as costs and fees reasonably incurred. The complainant and the named person then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing on the record. The filing of objections under AIR21 shall stay any remedy in the preliminary order except for preliminary reinstatement. This provision for preliminary reinstatement after the investigation is similar to Section 405 of STAA, 49 U.S.C. 31105. If a hearing before an administrative law judge is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, AIR21 requires the hearing to be conducted "expeditiously." The Secretary then has 120 days after the "conclusion of a hearing" in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, complainant and the named person may enter into a settlement agreement which terminates this proceeding. The Secretary may assess against the named person, on the complainant's request, a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees reasonably incurred by the complainant in bringing the complaint to the Secretary or in connection with participating in the

¹ Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary's Order 3-2000, 65 FR 50017 (August 16, 2000). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. See Secretary's Order 2-96, 61 FR 19978 (May 3, 1996).

proceeding which resulted in the order on behalf of the complainant. The Secretary may also award a prevailing employer an attorney's fee, not exceeding \$1,000, if she finds that the complaint is or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. Finally, AIR21 makes persons who violate these newly created whistleblower provisions subject to a civil penalty of up to \$1,000. This provision is administered by the FAA.

III. Summary and Discussion of Regulatory Provisions

Section 1979.100 Purpose and Scope

This section describes the purpose of the regulations implementing AIR21 and provides an overview of the procedures covered by these new regulations.

Section 1979.101 Definitions

In addition to the general definitions, the regulations include program-specific definitions of "air carrier" and "contractor." The statutory definition of "air carrier" applicable to AIR21 is found at 49 U.S.C. 40102(a)(2), a general definitional provision applicable to air commerce and safety. The statutory definition of "contractor" is found in AIR21 at 49 U.S.C. 42121(e).

Section 1979.102 Obligations and Prohibited Acts

This section describes the whistleblower activity which is protected under the Act and the type of conduct which is prohibited in response to any protected activity.

Section 1979.103 Filing of Discrimination Complaint

This section explains the requirements for filing a discrimination complaint. Under AIR21, to be timely a complaint must be filed within 90 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), this is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561–62 (6th Cir. 2001). Complaints under AIR21 do not need to

be made in any particular form, and, with the consent of the employee, may be made by any person on the employee's behalf. Oral complaints will be reduced to writing by the OSHA official receiving the complaint.

Section 1979.104 Investigation

AIR21 contains a requirement similar to the requirement in the ERA that a complaint shall be dismissed if it fails to make a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included in this section is the AIR21 requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the *prima facie* showing of the complainant. Under this section, the named person has the opportunity within ten days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of his or her position.

If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within ten days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments why preliminary relief is not warranted. This provision provides due process procedures in accordance with the Supreme Court decision under STAA in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

Section 1979.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue a finding regarding whether or not the complaint has merit. If the finding is that the complaint has merit, the Assistant Secretary will order appropriate preliminary relief.

The letter accompanying the findings and order advises the parties of their right to file objections to the findings of

the Assistant Secretary. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

Section 1979.106 Objections to the Findings and the Preliminary Order

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal or e-mail communication is considered the date of the filing. The filing of objections is also considered a request for a hearing before an ALJ.

Section 1979.107 Hearings

This section adopts the rules of practice of the Office of Administrative Law Judges at 29 CFR part 18. In order to assist in obtaining full development of the facts in whistleblower proceedings, formal rules of evidence do not apply. The section specifically provides for consolidation of hearings if both the complainant and the named person object to the findings and/or order of the Assistant Secretary.

Section 1979.108 Role of Federal Agencies

The ERA and STAA regulations provide two different models for agency participation in administrative proceedings. Under STAA, OSHA ordinarily prosecutes cases where a complaint has been found to be meritorious. Under ERA and the other environmental whistleblower statutes, on the other hand, OSHA does not ordinarily appear as a party in the proceeding. The Department has found that in most environmental whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation. Therefore this provision utilizes the approach of the ERA regulation at 29 CFR 24.6(f)(1). The Assistant Secretary, at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an administrative law judge; petition for review of a decision of an administrative law judge,

including a decision based on a settlement agreement between complainant and the named person, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or in the Administrative Review Board proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate in AIR21 proceedings, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The FAA, at that agency's discretion, also may participate as *amicus curiae* at any time in the proceedings. The Department believes it is unlikely that its preliminary decision not to ordinarily prosecute meritorious AIR21 cases will discourage employees from making complaints about air carrier safety. The Department seeks comment regarding its preliminary decision that the Assistant Secretary should not ordinarily participate in AIR21 proceedings, but should participate in appropriate cases, or whether instead the Department should follow the STAA model under which it ordinarily participates where a complaint is found to have merit. The Department will consider these comments, as well as its experience under this program in the interim, in issuance of the final rule.

Section 1979.109 Decision of the Administrative Law Judge

This section sets forth the content of the decision and order of the administrative law judge, and includes the statutory standard for finding a violation. The section further provides that the Assistant Secretary's determination as to whether to dismiss the complaint without an investigation or conduct an investigation pursuant to § 1979.104 is not subject to review by the ALJ, who hears the case on the merits.

Section 1979.110 Decision of the Administrative Review Board

The decision of the ALJ is the final decision of the Secretary if no timely petition for review is filed with the Administrative Review Board. Upon the issuance of the ALJ's decision, the parties have 15 days to petition the Board for review of that decision. The decision of the Board is required by the Act to be issued not later than 120 days after the date of the conclusion of the hearing before the ALJ, which is deemed to be the conclusion of all proceedings

before the administrative law judge—i.e., 15 days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim. If a timely petition for review is filed with the Board, any relief ordered by the ALJ, except for a preliminary order of reinstatement, is inoperative while review is conducted by the Board.

Section 1979.111 Withdrawal of Complaints, Objections, and Findings; Settlement

This section provides for the procedures and time periods for withdrawal of complaints, the withdrawal of findings by the Assistant Secretary, and the withdrawal of objections to findings. It also provides for approval of settlements at the investigatory and judicial stages of the case.

Section 1979.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the Administrative Review Board to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Section 1979.113 Judicial Enforcement

This section describes the Secretary's power under the statute to obtain judicial enforcement of orders and the terms of a settlement agreement. It also provides for enforcement of orders of the Secretary by the person on whose behalf the order was issued.

Section 1979.114 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the Secretary may, upon application and notice to the parties, waive any rule as justice or the administration of the Act requires.

IV. Paperwork Reduction Act

This rule contains a reporting requirement (§ 1979.103) which was previously reviewed and approved for use by the Office of Management and Budget ("OMB") under 29 CFR 24.3 and assigned OMB control number 1218-0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

V. Administrative Procedure Act

This rule is a rule of agency procedure and practice within the meaning of Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C.

553(b)(A). Therefore publication in the **Federal Register** of a notice of proposed rulemaking and request for comments is not required by these regulations, which provide procedures for the handling of discrimination complaints. Although this rule is not subject to the notice and comment procedures of the APA, persons interested in this interim final rule may submit comments within 60 days. A final rule will be published after the agency receives and reviews the public's comments.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule should be treated as a "significant regulatory action" within the meaning of Section 3(f)(4) of Executive Order 12866 because AIR21 is a new program and because of the importance to FAA's airline safety program that "whistleblowers" be protected from retaliation. E.O. 12866 requires a full economic impact analysis only for "economically significant" rules, which are defined in Section 3(f)(1) as rules that may "have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Because the rule is procedural in nature, it is not expected to have a significant economic impact; therefore no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency procedure or practice, it is not a "rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), and does not require Congressional review. Finally, this rule does not have "federalism implications." The rule does not have "substantial direct effects on the States, on the relationship between the national

government and the States, or on the distribution of power and responsibilities among the various levels of government" and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of AIR21, in order to allow resolution of whistleblower complaints. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

Document Preparation: This document was prepared under the direction and control of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 1979

Administrative practice and procedure, Air carrier safety, Employment, Investigations, Reporting and Recordkeeping requirements, Whistleblowing.

Signed at Washington, DC, this 22nd day of March, 2002.

John L. Henshaw,

Assistant Secretary for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble part 1979 of title 29 of the Code of Federal Regulations is promulgated as follows:

PART 1979—PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 519 OF THE WENDELL H. FORD AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

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- 1979.100 Purpose and scope.
- 1979.101 Definitions.
- 1979.102 Obligations and prohibited acts.
- 1979.103 Filing of discrimination complaint.
- 1979.104 Investigation.
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- 1979.106 Objections to the findings and the preliminary order and request for a hearing.
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- 1979.108 Role of Federal agencies.
- 1979.109 Decision and orders of the administrative law judge.

- 1979.110 Decision and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

- 1979.111 Withdrawal of complaints, objections, and findings; settlement.
- 1979.112 Judicial review.
- 1979.113 Judicial enforcement.
- 1979.114 Special circumstances; waiver of rules.

Authority: 49 U.S.C. 42121; Secretary of Labor's Order No. 3–2000, 65 FR 50017 (August 16, 2000).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

§ 1979.100 Purpose and scope.

(a) This part implements procedures under section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 ("AIR21"), which provides for employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.

(b) This part establishes procedures pursuant to AIR21 for the expeditious handling of complaints of discrimination made by employees, or by persons acting on their behalf. These rules, together with those rules set forth at 29 CFR part 18, set forth the procedures for submission of complaints under AIR21, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.

§ 1979.101 Definitions.

Act or *AIR21* means section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181, April 5, 2000, 49 U.S.C. 42121.

Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

Complainant means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.

Contractor means a company that performs safety-sensitive functions by contract for an air carrier.

Employee means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

Named person means the person alleged to have violated the Act.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.

Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

§ 1979.102 Obligations and prohibited acts.

(a) No air carrier or contractor or subcontractor of an air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

(2) Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States;

(3) Testified or is about to testify in such a proceeding; or

(4) Assisted or participated or is about to assist or participate in such a proceeding.

(c) This part shall have no application to any employee of an air carrier, contractor, or subcontractor who, acting without direction from an air carrier, contractor, or subcontractor (or such person's agent) deliberately causes a violation of any requirement relating to air carrier safety under Subtitle VII Aviation Programs of Title 49 of the United States Code or any other law of the United States.

§ 1979.103 Filing of discrimination complaint.

(a) *Who may file.* An employee who believes that he or she has been discriminated against by an air carrier or contractor or subcontractor of an air carrier in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

(b) *Nature of filing.* No particular form of complaint is required.

(c) *Place of filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any Department of Labor officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: www.osha.gov.

(d) *Time for filing.* Within 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

(e) *Relationship to section 11(c) complaints.* A complaint filed under AIR21 that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), shall be deemed to be a complaint filed under both AIR21 and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of AIR21 shall be deemed to be a complaint filed under both AIR21 and section 11(c).

§ 1979.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (sanitized to protect the identity of any confidential informants). The Assistant Secretary will also notify the named person of his or her rights under paragraphs (b) and (c) of this section. A copy of the notice to the named person will also be provided to the Federal Aviation Administration.

(b) A complaint of alleged violation will be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:

- (i) The employee engaged in a protected activity or conduct;
- (ii) The named person knew, actually or constructively, that the employee engaged in the protected activity;
- (iii) The employee suffered an unfavorable personnel action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the named person knew (or suspected) that the employee engaged in protected activity and that the protected activity was likely a reason for the personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, an investigation of the complaint will not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear

and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within ten days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating his or her position. Within the same ten days the named person may request a meeting with the Assistant Secretary to present his or her position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, an investigation will be conducted. Investigations will be conducted in a manner that protects the confidentiality of any person, other than the complainant, who provides information on a confidential basis, in accordance with part 70 of this title.

(e) Prior to the issuance of findings and a preliminary order as provided for in § 1979.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be sanitized to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be sanitized without revealing the identity of confidential informants, summaries of their contents will be provided. The named person shall be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of his or her position, and to present legal and factual arguments. The named person shall present this evidence within ten days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person can agree, if the interests of justice so require.

§ 1979.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of filing of the

complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act. If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. At the complainant's request the order may also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with the filing of the complaint. If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) Upon the request of the named person, the Assistant Secretary shall determine, on the basis of information gathered under the procedures of § 1979.104, whether a complaint was frivolous or was brought in bad faith. If the the Assistant Secretary determines the complaint was frivolous or was brought in bad faith, the Assistant Secretary may award to the named person a reasonable attorney's fee not exceeding \$1,000. In order to support such award, the Assistant Secretary may require the named person to provide evidence of the attorney's fee it has incurred.

(c) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of the right to object to the findings and/or the order and will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the findings and order.

(d) The findings and the preliminary order shall be effective 30 days after receipt by the named person, but shall be inoperative if an objection to the findings and preliminary order has been timely filed. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon receipt of the

findings and preliminary order, regardless of any objections to the findings and order, and may not be stayed.

Subpart B—Litigation

§ 1979.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or of an award of attorney's fees under § 1979.105(b), must file objections and a request for a hearing on the record, within 30 days of receipt of the findings and preliminary order. The objection and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or the award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20210, and copies of the objections must be mailed at the same time to the other parties of record, the Assistant Secretary's designee who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order, except an order of preliminary reinstatement, shall be stayed. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order.

(2) The findings and the preliminary order shall be effective 30 days after receipt unless an objection to the findings or preliminary order has been timely filed. If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

§ 1979.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations.

(b) Upon receipt of an objection and request for hearing, the Chief

Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted as hearings *de novo*, on the record.

(c) If both complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

§ 1979.108 Role of Federal agencies.

(a)(1) The complainant and the named person shall be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or may participate as *amicus curiae* at any time in the proceedings. This right to participate shall include, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, to dismiss a complaint or to issue an order encompassing the terms of the settlement.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) The FAA may participate as *amicus curiae* at any time in the proceedings, at the FAA's discretion. At the request of the FAA, copies of all pleadings in a case must be served on the FAA, whether or not the FAA is participating in the proceeding.

§ 1979.109 Decision and orders of the administrative law judge.

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the

unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint pursuant to § 1979.104 without completing an investigation nor the Assistant Secretary's determination not to dismiss a complaint is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.

(b) If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding \$1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary shall be effective immediately upon receipt of the decision by the named person, and may not be stayed. All other portions of the judge's order shall be effective 15 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§ 1979.110 Decision and orders of the Administrative Review Board.

(a) The decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Administrative Review Board ("the Board"). Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a

written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, a petition must be received within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed.

(b) Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(c) The final decision of the Board shall be issued within 120 days of the conclusion of the hearing, which shall be deemed to be the conclusion of all proceedings before the administrative law judge—i.e., 15 days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. If the Assistant Secretary is not a party, the final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(d) If the Board concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

(e) If the Board determines that the named person has not violated the law, an order shall be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was

brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding \$1,000.

Subpart C—Miscellaneous Provisions

§ 1979.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether the withdrawal will be approved. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 30-day objection period, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement shall be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, shall constitute

the final order of the Secretary and may be enforced pursuant to § 1979.112.

§ 1979.112 Judicial review.

(a) Within 60 days after the issuance of a final order under § 1979.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the person resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

§ 1979.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the

district in which the violation was found to have occurred.

§ 1979.114 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Administrative Review Board on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.

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