

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 24

RIN 1215-AA83

Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes

AGENCY: Office of the Secretary and the Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of revised regulations governing the employee protection ("whistleblower") provisions of Section 211 (formerly Section 210) of the Energy Reorganization Act of 1974, as amended, to implement the statutory changes enacted into law on October 24, 1992, as part of the Energy Policy Act of 1992. This rule establishes separate procedures and time frames for the handling of ERA complaints to implement the statutory amendments. In addition, the rule establishes a revised procedure for review by the Administrative Review Board (on behalf of the Secretary) of decisions of administrative law judges under all of the various environmental employee protection provisions. The rule also reflects the transfer of responsibility for administration of these statutes from the Administrator of the Wage and Hour Division to the Assistant Secretary for Occupational Safety and Health.

DATES: This final rule is effective March 11, 1998.

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SUPPLEMENTARY INFORMATION: The Energy Policy Act of 1992, Public Law 102-486, was enacted on October 24, 1992. Among other provisions, this new law significantly amended the employee protection provisions for nuclear whistleblowers under former Section 210 of the Energy Reorganization Act of 1974, as amended ("ERA"), now Section 211, 42 U.S.C. 5851(b)(1). The amendments affect only ERA whistleblower complaints and do not extend to the procedures established in 29 CFR Part 24 for handling employee whistleblower complaints under the six other environmental employee protection statutes. The amendments to

ERA apply to whistleblower claims filed on or after October 24, 1992, the date of enactment of Section 2902 of the Energy Policy Act of 1992.

A notice of proposed rulemaking and request for comments was published in the **Federal Register** on March 16, 1994 (59 FR 12506). The **Federal Register** notice provided for a comment period until May 16, 1994. A total of four comments were received during the comment period on the proposed regulations, all from employers or representatives of employers. The major issues raised by the commenters are identified below, as are the significant changes that have been made in the final regulatory text in response to the comments received. In addition to the substantive comments discussed below, commenters submitted minor editorial suggestions, some of which have been adopted and some of which have not been adopted.

Paperwork Reduction Act

This regulation contains no new reporting or recordkeeping requirements. Reporting requirements contained in the regulations (§ 24.3) were previously reviewed and approved for use through February 28, 1998 by the Office of Management and Budget (OMB) and assigned OMB control number 1215-0183 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

Summary of Statutory Changes to ERA Whistleblower Provisions

Section 2902 of Public Law 102-486 (106 Stat. 2776) amended former Section 210 of the ERA, 42 U.S.C. 5851, by renumbering it as Section 211 of the ERA and making the additional changes described below.

Prohibited Acts

Former Section 210 of the ERA protected an employee against discrimination from an employer because the employee: (1) commenced, caused to be commenced, or was about to commence or cause to be commenced a proceeding under the ERA or the Atomic Energy Act of 1954 ("AEA"); (2) testified or was about to testify in any such proceeding; or (3) assisted or participated or was about to assist or participate in any manner in such a proceeding " * * * or in any other action to carry out the purposes of [the ERA or the AEA]." The Department's consistent interpretation, under former Section 210 of the ERA as well as the other environmental whistleblower laws which the Department of Labor ("DOL") administers, has been that employees who file complaints internally with an

employer are protected from employer reprisals. An employee is protected under 29 C.F.R. 24.2(b)(3) if an employee assists or participates in " * * * any other action to carry out the purposes of such Federal [environmental protection] statute," which would encompass such internal complaints. This conclusion, that whistleblower protections extend to internal safety and quality control complaints, has been sustained by a number of courts of appeals. See, e.g., *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Passaic Valley Sewerage Commissioner v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993), *cert. denied*, 62 U.S. L.W. 3334 (1993). *Contra, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). Under the Energy Policy Act of 1992, ERA's statutory definition of protected whistleblower activity was expanded expressly to include employees who file internal complaints with employers (thereby overriding the decision of the Fifth Circuit in *Brown & Root*), employees who oppose any unlawful practice under the ERA or the AEA, and employees who testify before Congress or in any other Federal or State proceeding regarding the ERA or AEA.

Revised Definition of "Employer"

Former Section 210 of the ERA included within the definition of a covered "employer" licensees of the Nuclear Regulatory Commission ("NRC"), applicants for such licenses, and their contractors and subcontractors. The statutory amendments revised the definition of "employer" to extend coverage to employees of contractors or subcontractors of the Department of Energy ("DOE"), except those involved in naval nuclear propulsion work under E.O. 12344, licensees of an agreement State under Section 274 of the Atomic Energy Act of 1954, applicants for such licenses, and their contractors and subcontractors.

Time Period for Filing Complaints

The time period for filing ERA whistleblower complaints was expanded from 30 days to 180 days from the date the violation occurs. Investigations of complaints, however, are still to be conducted under the statute within 30 days of receipt of the complaint. The ERA amendments apply to all complaints filed on or after the date of enactment.

Interim Relief

The Secretary is required under the amended ERA to order interim relief upon the conclusion of an administrative hearing and the issuance of a recommended decision that the complaint has merit. Such interim relief includes all relief that would be included in a final order of the Secretary except compensatory damages.

Burdens of Proof; Avoidance of Frivolous Complaints

The 1992 Amendments revised the burdens of proof in ERA cases by establishing statutory burdens of proof and a standard for the dismissal of complaints which do not present a *prima facie* case. Before the 1992 Amendments, the ERA itself contained no statutory rules on burdens of proof—the burdens of proof were based on precedential cases derived from other discrimination law (see, e.g., *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); and *Dartey v. Zack Company of Chicago*, Case No. 82-ERA (Decision of the Secretary, April 25, 1983)).

Under the former lines of analysis for the ERA and continuing for whistleblower complaints under the other six environmental statutes, once a complainant employee presents evidence sufficient to raise an inference that protected conduct likely was a “motivating” factor in an adverse action taken by an employer against the employee, it is necessary for the employer to present evidence that the alleged adverse treatment was motivated by legitimate, nondiscriminatory reasons. If the employer presents such evidence, the employee still may succeed by showing that the proffered reason was pretextual, that is, that a discriminatory reason more likely motivated the employer. The complainant thus bears the ultimate burden of proving by a preponderance of the evidence that he or she was retaliated against in violation of the law. In such “pretext” cases, the factfinder’s disbelief of the reasons put forward by the employer, together with the elements of the *prima facie* case, may be sufficient to show such intentional discrimination. See *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993); *Dartey v. Zack*, *supra*, pp. 6–9.

In certain cases, the trier of fact may conclude that the employer was motivated by both prohibited and legitimate reasons (“dual motive”

cases). In such dual motive cases, the employer may prevail only by showing by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

The 1992 amendments added new statutory burdens of proof to the ERA. The changes have been described on the one hand as a lowering of the burden on complainants in order to facilitate relief for employees who have been retaliated against for exercising their statutory rights, and, on the other hand, as a limitation on the investigative authority of the Secretary of Labor when the burden is not met.

Under the ERA as amended, a complainant must make a “*prima facie*” showing that protected conduct or activity was “a contributing factor” in the unfavorable personnel action alleged in the complaint, *i.e.*, that the whistleblowing activity, alone or in combination with other factors, affected in some way the outcome of the employer’s personnel decision (section 211(b)(3)(A)). This is a lesser standard than the “significant”, “motivating”, “substantial”, or “predominant” factor standard sometimes articulated in case law under statutes prohibiting discrimination. If the complainant does not make the *prima facie* showing, the complaint must be dismissed and the investigation discontinued.

Even in cases where the complainant meets the initial burden of a *prima facie* showing, the investigation must be discontinued if the employer “demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action” in the absence of the protected conduct (section 211(b)(3)(B)). The complainant is free, as under prior law, to pursue the case before the administrative law judge (ALJ) if the Secretary dismisses the complaint.

The “clear and convincing evidence” standard is a higher degree of proof burden on employers than the former “preponderance of the evidence” standard. In the words of Representative George Miller, Chairman of the House Committee on Interior and Insular Affairs, “[t]he conferees intend to replace the burden of proof enunciated in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), with this lower burden in order to facilitate relief for employees who have been retaliated against for exercising their rights under section 210 * * *.” 138 Cong. Rec. H 11409 (October 5, 1992).

Thus, under the amendments to ERA, the Secretary must dismiss the complaint and not investigate (or cease investigating) if either: (1) The

complainant fails to meet the *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected conduct.

These new burden of proof limitations also apply to the determination as to whether an employer has violated the Act and relief should be ordered. Thus, 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 (section 211(b)(3)(C)). Where the complainant satisfies this burden, relief still may not be ordered if the employer satisfies the statutory requirement to demonstrate by “clear and convincing evidence” that it would have taken the same personnel action in the absence of the protected activity (section 211(b)(3)(D)).

Other Changes

The ERA whistleblower provisions must be prominently posted in any place of employment to which the Act applies. The amendments also include an express provision that the ERA whistleblower provisions may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee’s discharge or other discriminatory action taken by the employer against the employee—codifying and broadening the Supreme Court decision in *English v. General Electric Co.*, 496 U.S. 72 (1990). Finally, the amendments direct the NRC and DOE not to delay addressing any “substantial safety hazard” during the pendency of a whistleblower proceeding, and provide that a determination by the Secretary of Labor that a whistleblower violation has not occurred “shall not be considered” by the NRC and DOE in determining whether a substantial safety hazard exists.

Summary and Discussion of Major Comments

Comments were received from the Tennessee Valley Authority (TVA); the Nuclear Energy Institute (the organization of the nuclear power industry responsible for coordinating efforts of utilities licensed by NRC on regulatory issues); the law firm of Winston & Strawn, on behalf of five utility companies and TVA; and Westinghouse Electric Corporation. In

addition, in the period since the comment period closed, a request for rulemaking was received from Steptoe and Johnson on behalf of Alyeska Pipeline Service Company, which has also been considered.

The major comments received by the Department and the response of the Department to the comments are discussed as they pertain to each section of Part 24 which is amended or to which new provisions are added.

One comment was the general suggestion that these rules should be produced through negotiated rulemaking, involving, as that process does, the regulatory agencies (Nuclear Regulatory Commission, Department of Energy, Environmental Protection Agency), industry, public interest groups, and respondents and complainants and their representatives. The Department does not believe that negotiated rulemaking is appropriate for these regulations. The regulations involve largely procedural issues not so difficult to resolve as to justify invoking the procedures of the Negotiated Rulemaking Act of 1990, 5 U.S.C. 581 *et seq.*

In the period since the proposed rule was published, two significant organizational changes have taken place in the Department of Labor which materially affect these regulations. By Secretary's Order No. 2-96 (61 FR 19978, May 3, 1996), the Secretary appointed an Administrative Review Board ("ARB" or "Board") to decide all cases previously decided by the Secretary, including the various employee protection "whistleblower" statutes which are the subject of these regulations. Therefore the ARB has been substituted for references to the Secretary.

In addition, the Secretary has delegated the authority to investigate complaints under these statutes to the Assistant Secretary of the Occupational Safety and Health Administration ("OSHA"), effective for all complaints received on or after February 3, 1997. Secretary's Order 6-96 (62 FR 111, Jan. 2, 1997, as corrected by 62 FR 8085, Feb. 21, 1997). Since OSHA already had authority to investigate complaints under the employee protection provisions of the Surface Transportation Assistance Act and the discrimination provisions of the Occupational Safety and Health Act, this action placed all authority to investigate alleged discrimination because of an employee's complaints regarding the environment and safety and health (other than in the mining industry) in one agency. Therefore in these regulations OSHA has been substituted for all references to

the Wage and Hour Division and the Administrator thereof.

The Department has also published a proposed rule to provide new alternative dispute resolution ("ADR") procedures in a number of Departmental programs, including the various whistleblower statutes. 62 FR 6690 (Feb. 12, 1997). This would supplement existing procedures in the regulations of the Office of Administrative Law Judges, which allow the parties to a proceeding before an ALJ to request appointment of a settlement judge to seek voluntary resolution of the issues. 29 CFR 18.9(e). The proposed rule envisions a pilot program under which the Department would investigate a complaint and then, where the case is found to be suitable for ADR, offer the employer and employees the option of mediation and/or arbitration. The ARB would not be bound by any resolution reached, but would incorporate the settlement in the final ARB order where it meets ARB standards. 62 FR 6693.

Section 24.1 Purpose and Scope

The proposal updated the list of the Federal statutes providing employee protections for whistleblowing activities for which the Department of Labor is responsible for enforcement under this part to add the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610. This was subsequently accomplished in another rulemaking. 62 FR 19985 (May 3, 1996). No comments were received on this provision and no changes have been made.

Section 24.2 Obligations and Prohibited Acts

The proposal revised this provision to reflect the statutory amendments adding to the list of protected activities explicitly covered under the ERA, and to state that under the Secretary's interpretation, the whistleblowing activities added to the ERA are protected under all of the whistleblower statutes. The requirement for posting of notices of the employee protection provisions of the ERA was also added, together with a provision that failure to post the required notice shall make the requirement that a complaint be filed with the Administrator within 180 days inoperative unless and until the notice is later posted or the respondent is able to establish that the employee had actual notice of the provisions. This explicit recognition that the statute of limitations may be equitably tolled is based on case law under analogous statutes. See, for example, *Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*,

450 U.S. 959 (1981), and *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), arising under the Age Discrimination in Employment Act, and *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984), arising under the Fair Labor Standards Act.

Three commenters state that references to the Atomic Energy Act of 1954 are incorrect because that statute has no whistleblower provisions involving the Secretary of Labor, and they state that the NRC enforces all aspects of that statute.

The Department recognizes that the whistleblower provisions were enacted to be a part of the Energy Reorganization Act of 1974, as amended in 1992. The confusion arises because the whistleblower provisions protect whistleblowers when they disclose alleged substantive violations of the Atomic Energy Act; however, when they are discriminated against for doing so, this is a violation of the ERA, not the Atomic Energy Act. The statutory references is clarified accordingly.

Two commenters assert that the regulation's description of employer conduct which is prohibited—"intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against an employee"—should be deleted in favor of the language of the statute, which prohibits the employer's "discharge [of] any employee or otherwise discriminat[ing] against any employee with respect to his compensation, terms, conditions, or privileges of employment * * *."

The language in paragraph (b) of the proposed regulation is exactly the same as the language in § 24.2(b) of the current regulation. The language is simply a fuller statement of the scope of prohibited conduct, which encompasses discrimination of any kind with respect to the terms, conditions or privileges of employment. Accordingly, no change is necessary.

One commenter points out that the regulations proscribe discrimination by an employer against an employee who "has" engaged in protected conduct. The commenter believes that literally read, the regulation does not require a showing of a causal connection between whistleblowing and discrimination.

In order to avoid any possibility of confusion, the language of the regulation in paragraphs (b) and (c) has been changed to reflect the statutory language.

The regulations at § 24.2(d) provide that the required poster must be prepared or approved by DOL. Two of the commenters believe that the poster

currently required by the Nuclear Regulatory Commission is adequate and no additional poster should be required. One commenter sees this as unnecessary as long as the employer's poster contains the required information.

The statute states: "The provisions of this section shall be prominently posted in any place of employment to which this section applies." The Department believes that it is necessary to use a poster prepared or approved by the Department to ensure that the poster contains the essential information which needs to be communicated to employees. For the convenience of the public, the Department has prepared a poster which is published as an appendix to this rule and which is available at any local OSHA office and at the DOL Website. The Department will also approve any poster which contains the same information and does not contain any misleading information. For example, the Department is working with NRC to approve a poster which would satisfy its needs as well as the requirements of the ERA, thus eliminating the need that both notices be posted.

Contrary to the statement of the commenter, there is no requirement in these regulations that respondents keep records of the posting of the notice. This is a continuing requirement that should not require any kind of recordkeeping.

Three commenters discuss the proposed § 24.2(d)(2), under which the employer's failure to post the required notice of employee rights could lead to a tolling of the statute of limitations. They express the concern that the tolling rule will be applied too automatically, rather than on a case-by-case basis pursuant to general equitable principles as applied to all the facts and circumstances of a particular case.

The regulation indicates that the employer has an opportunity to show that the complaining employee was in fact aware of his or her rights, and thus equitable tolling would not apply. A clarifying change is made to the regulation to provide that the 180 day period "ordinarily" runs from the date the notice is posted (assuming of course that the employee was still employed at the site) or the employee receives actual notice.

Section 24.3 Complaints

The proposed regulation revised § 24.3 to reflect the 180-day filing period for complaints under the ERA.

One commenter asserts that the regulations should provide that the respondent may raise the issue of timeliness of complaints any time prior to the conclusion of the hearing. The

commenter suggests that without such provision respondents will be deprived of the opportunity to raise the timeliness issue at a time which is fair to them.

As the commenter noted, pursuant to the rules of the Office of Administrative Law Judges at 29 C.F.R. 18.1(a), the Federal Rules of Civil Procedure ("FRCP") apply in any instance where there is no explicit rule in Part 18 or the governing program's statute and regulations. Although, unlike under the Federal Rules, there is no provision for filing an answer in these regulations, there are commonly various occasions where issues such as timeliness can and appropriately should be raised. The Department believes it is reasonable to require that timeliness ordinarily be raised early in the proceedings, as both the ALJ and the Secretary ruled in *Hobby v. Georgia Power Co.*, No. 90-ERA-30, ALJ's Recommended Decision and Order (Nov. 8, 1991), Secretary (Aug. 4, 1995) (reversing and remanding on other grounds). A specific provision seems unnecessary.

Two commenters take issue with the present practice, which is continued in the proposed regulations, of not requiring the complainant to serve the complaint on the respondent at the same time it is filed with the Department. Currently the respondent must wait to receive the complaint from the Department. The commenters argue that requiring the complainant to serve the complaint on the respondent would increase the respondent's response time. Under their view of what the regulations should require, if the complainant did not serve the respondent, then the respondent should have additional time to respond to the Department.

In the Department's experience the procedure in the present regulations has worked satisfactorily. The Department may need to examine the complaint or, as discussed below, to supplement the complaint with interviews of the complainant, before sending it to the respondent. Furthermore, a complainant may wish to withdraw a complaint if, for example, he or she learns it is untimely. A comparison in this regard with proceedings before administrative law judges is not valid, because the complaint initiates an investigation, not a proceeding before an ALJ.

One commenter states that the regulations appear to protect persons who raise concerns in bad faith, but does not cite any specific language in the regulations to support that proposition.

Nothing in the current or proposed regulations provides for relief where complaints are found to be made in bad

faith. Such a provision seems unnecessary. However, former § 24.9, which was inadvertently omitted from the proposal, has been included again. This provision declares that employees who deliberately and without direction of their employer violate Federal law are not protected.

Section 24.4 Investigations

Section 24.4 was proposed to be revised to provide for filing of hearing requests by facsimile (fax), telegram, hand-delivery, or next-day delivery service (e.g., overnight couriers), to conform the regulations to current business practices. In addition, the proposed regulation provided that the request for a hearing must be received within five business days, rather than five calendar days, from receipt of the Administrator's determination. The proposed regulation also made it clear that the complainant may appeal from a finding that a violation has occurred where the determination or order is partially adverse (e.g., where a complaint was only partially substantiated or the order did not grant all of the requested relief).

One commenter suggests that the regulations should make clear that in a case where only a prevailing complainant appeals to an ALJ because of dissatisfaction with the remedy ordered by the Administrator (now the Assistant Secretary for OSHA), the non-appealing respondent would have an opportunity to contest liability before the ALJ. This would prevent respondents from having to file appeals in cases in which they have decided not to challenge the Administrator's ruling, not knowing in which cases the complainant will contest the remedy.

Allowing cross-appeals would eliminate the need for complainants and respondents to guess in such cases or to file appeals in all such cases. This section is amended accordingly to allow for cross appeals. In addition, this section is simplified to provide the mechanism for appeals of both the complainant and the respondent in the same paragraph.

As one commenter suggested, this section and § 24.8 are further amended in accordance with the Supreme Court decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), to make it clear that exhaustion of administrative remedies is required.

In response to a question raised by one commenter, § 24.4(d)(3) is revised to make it clear that service of copies of the appeal must be done by the party appealing.

Section 24.5 Investigations under the Energy Reorganization Act

A new § 24.5, concerning investigations under the Energy Reorganization Act, was proposed to detail operation of the new provisions under the ERA for dismissal of complaints where the employee has not alleged a *prima facie* case, or the employer has submitted clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity.

Three commenters are critical of the Department's formulation in § 24.5(b) of what constitutes a *prima facie* case. They believe that the regulations should require the complainants to provide supporting evidence with their complaints, and they believe that the regulations give too much weight to the amount of time between the protected activity and the adverse action. In support of this latter criticism they cite cases for the proposition that this temporal proximity may be overcome by the employer's evidence of non-discriminatory reasons for the adverse action.

It would be overly restrictive to require a complainant to provide evidence of discrimination (as distinguished from a showing) when the only purpose of the complaint is to trigger an investigation to determine if there is evidence of discrimination. Complainants generally do not have the knowledge or resources to actually submit "evidence" of the violative conduct. With regard to the cited cases finding that temporal proximity between the protected activity and the adverse action was not enough to prove discrimination, those cases involved final decisions on the merits after evidence has been presented by both parties. As set forth in *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989), case law establishes that "temporal proximity is sufficient as a matter of law to establish the final required element in a *prima facie* case of retaliatory discharge."

Furthermore, the regulation at issue here involves the complaint stage of the proceeding and merely triggers an investigation and not a finding by OSHA on the merits of the complaint. The regulation does not state that temporal proximity is always enough to establish a *prima facie* case, but rather states only that it is normally so. In arriving at a final decision, OSHA considers all pertinent evidence in addition to temporal proximity.

One commenter cites cases dealing with who in the respondent organization must have the knowledge

of the protected activity as part of a *prima facie* case and suggests that the regulations address this issue. This is a matter which must be determined on the basis of all the facts and circumstances of a particular case and is not suitable for inclusion in the regulations.

The proposed regulations at § 24.5(b)(2) provide that the complainant must allege the existence of facts and evidence constituting a *prima facie* case of a violation in the complaint, supplemented as appropriate by interviews of the complainant. One commenter seeks elimination of these supplemental interviews. Two commenters suggest that since Wage and Hour (now the Occupational Safety and Health Administration) provides the complaint to the employer for his response, it is only fair to provide the employer with the information obtained in the interviews, as it might contain one or more of the elements of a violation to which the employer is required to respond.

In the Department's view, the supplementation of the complaint by interviews of the complainant is necessary and appropriate because employees commonly lack the sophistication to aver the elements of a *prima facie* case and evidence in support thereof. It is recognized, however, that the supplemental interviews become a part of the complaint, and therefore in all fairness this information, in addition to the original complaint (which is routinely provided to the employer), ought to be provided to the employer. The regulation has been amended to so provide.

As suggested by one commenter, § 24.5(b)(2) has been revised to separate out two elements of the required *prima facie* showing—that adverse personnel action has occurred, and that it likely resulted from the protected activity.

One commenter questions the language in § 24.5(b)(3) wherein a *prima facie* case is described as an inference that the respondent knew of the complainant's protected activity and the protected activity "was likely a reason" for an adverse personnel action. The commenter believes that this language creates a standard different from the statutory requirement that the protected activity be "a contributing factor" in the unfavorable personnel action.

There is no intention to deviate from the statutory standard for establishment of a *prima facie* case, as set forth in § 24.5(b)(2). The language "was likely a reason" was used to explain the meaning of "was a contributing factor." However, the provision is clarified.

One commenter argues that this section should require pleading and proof of various facts relating to a claim of retaliatory nonselection, failure to hire, nonretention, nonpromotion, improper disciplinary action, improper layoff or contract termination.

The facts that must be pled and proven to establish a particular form of discrimination depend on the facts and circumstances of a particular case. The Department does not believe that it is appropriate to attempt to catalogue in a regulation all such facts for all possible forms of discrimination, as suggested by the commenter.

One commenter points out a typographical error: At § 24.5(b)(2) the word "appropriated" was intended to read "appropriate."

Another commenter points out a typographical error in § 24.5(c)(2), which provides that the respondent has five business days to rebut the allegations in the complaint "from receipt of notification of the complainant." This is a typographical error and the provision is amended by changing "complainant" to "complaint".

One commenter believes that the legislative history of the 1992 Amendments shows that the "clear and convincing" standard applicable to the respondent's burden of proof to rebut the complainant's *prima facie* case applies only at the pre-investigative stage of the case and does not apply when the case is before the ALJ and the Secretary (ARB).

The 1992 Amendments show clearly that the "clear and convincing" standard is applicable to respondents at all stages of the proceedings. The new § 24.5(c)(1) applies the standard to the pre-investigative stage of the proceedings. The new § 24.7(b) applies the standard to proceedings before the ALJ and the Administrative Review Board. The interplay of these provisions was at issue in the recent case of *Dysert v. United States Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997), in which the court affirmed the Secretary's determination that a complainant must show more than a *prima facie* case of discrimination in order to shift the burden of persuasion to the employer. Rather, the complainant must "demonstrate" that the protected behavior was a contributing factor by a preponderance of the evidence before the ALJ. In dual motive cases, the burden then shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

Three commenters do not believe that five days is enough time for respondents to respond to the complainant's *prima facie* case with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity.

Given the overall statutory time frame of 90 days, and the time necessary for other stages of the proceedings, no more than five days is available for this stage of the process. At any time during the investigation the respondent is free to provide OSHA with evidence in its defense which will be considered by OSHA in making its final determination.

Section 24.5(d) is revised to simplify the provisions for appeal of a notice of dismissal of a complaint by cross-referencing the service provisions in § 24.4.

Section 24.6 Hearings

Proposed § 24.6 (formerly § 24.5) made it clear that the Wage-Hour Administrator (now the Assistant Secretary of OSHA) may participate in proceedings as a party or as *amicus curiae*. In addition, at the request of the Nuclear Regulatory Commission, an express provision was added to permit Federal agencies to participate as *amicus curiae*, and to receive copies of pleadings on request.

Because of comments suggesting that the various time frames are too short, and in recognition of current practices, § 24.6(a) is amended to allow the parties to agree to a postponement of the hearing.

Two commenters criticize the new provision in § 24.6(f)(1) allowing the Administrator (now the Assistant Secretary of OSHA) to participate as a party or as *amicus curiae* at any time in the proceedings. They argue that the Administrator cannot objectively investigate a complaint and then participate as a party, and that the Administrator's participation as a party would present problems about confidential information obtained during the investigative stage of the proceeding and with the attendance of witnesses at the hearing. In addition, one commenter believes this provision would run counter to 29 CFR 18.32 and be in conflict with Secretary's Order 1-93 (now Secretary's Order 6-96), which specifies that the Solicitor of Labor makes the determination to bring legal proceedings.

This proposal makes it expressly possible for the Assistant Secretary to participate as an *amicus* or a party as a matter of right in any case where such participation is necessary or beneficial to the program. Under the existing regulations, the Administrator (now the

Assistant Secretary) in certain cases has acted as *amicus* before ALJs and the Secretary (now the ARB). The Assistant Secretary's participation as an *amicus* or party would follow an investigation conducted pursuant to the normal procedures, as happens in most other programs where the Department prosecutes after conducting an investigation. Since the Assistant Secretary is not the adjudicator, there would be no conflict between the Assistant Secretary first investigating a complaint and later acting in a prosecutorial capacity. An analogous procedure is followed in other programs. See, e.g., the Davis-Bacon regulations at 29 CFR 5.11. Furthermore, as in other programs, OSHA would not be required to disclose confidential information. Witnesses would be available pursuant to normal procedures. Since OSHA would not be both a party in a case and an advisor to the Secretary, there is no conflict with 29 CFR 18.32. Finally, the Solicitor of Labor, or appropriate designee, would continue to make the decision as to participation in the legal proceedings, and would represent the Assistant Secretary, consistent with Secretary's Order 6-96.

One commenter asserts that the requirements in § 24.6(f)(2) and in §§ 24.4(d)(4) and 24.5(d)(2) that parties serve the Administrator (now the Assistant Secretary of OSHA) and the Associate Solicitor of the Fair Labor Standards Division with pleadings and with copies of the request for a hearing violate the Paperwork Reduction Act, and that requiring these "numerous filings" is burdensome. Another commenter reads the proposed rule as requiring employers to keep records of compliance with the posting requirements.

This requirement is not subject to the Paperwork Reduction Act because the Act exempts collections of information during the conduct of an administrative action, investigation or audit against specific individuals or entities. 5 CFR 1320.4(a)(2). Since OSHA does not participate in most cases, service of copies of pleadings and briefs is important to keep the Assistant Secretary and the Solicitor informed of cases in which the Department could have an interest.

One commenter suggests that the regulations contain an express reference making the rules for the conduct of ALJ proceedings in 29 CFR Part 18 and the rules of evidence in that part applicable to the proceedings in these cases. This would replace the provision in the current § 24.5(e)(1) relating to "procedures, evidence and record." A

petition for rulemaking has also been received making the same request.

The regulations at 29 C.F.R. 24.5(e)(1) (renumbered as § 24.6(e)(1)) provide that formal rules of evidence shall not apply to these proceedings. The Department believes it is inappropriate to apply the rules of evidence at 29 C.F.R. Part 18 because whistleblowers often appear *pro se*. Furthermore, hearsay evidence is often appropriate in whistleblower cases, as there often are no relevant documents or witnesses to prove discriminatory intent. ALJs have the responsibility to determine the appropriate weight to be given such evidence. For these reasons the interests of determining all of the relevant facts is best served by not requiring strict evidentiary rules and no change is made in this provision.

One commenter states that the regulations need to address the issue of voluntary dismissals, allowing unilateral dismissals only prior to a request for a hearing. After a request for a hearing a dismissal could only be granted if the respondent agreed to it or was compensated for costs, fees and expenses incurred in defending against the complaint up to that point.

Although the regulations have no provision addressing voluntary dismissals, these proceedings are governed by the rules of the Office of Administrative Law Judges at 29 C.F.R. Part 18 unless these regulations provide to the contrary. Those rules in turn provide at § 18.1(a) that the Federal Rules of Civil Procedure ("FRCP") apply in any instance where there is no explicit rule in Part 18 or the governing program's statute and regulations. Rule 41(a) of the FRCP allows voluntary, unilateral dismissal only up to the time the answer (or motion for summary judgment if earlier) is filed; thereafter the dismissal must be agreed to by the respondent or ordered by the court. The Department has applied Rule 41(a) to whistleblower proceedings. See, e.g., *Carter v. Los Alamos Nat'l Lab.*, No. 93-CAA-10 (March 21, 1994); *Ryan v. Pacific Gas & Electric Co.*, No. 87-ERA-32 (Aug. 9, 1989); *Nolder v. Raymond Kaiser Eng'rs, Inc.*, No. 84-ERA-5 (June 28, 1985). The Department sees no reason why any other rule should apply to whistleblower proceedings. Therefore no amendment is necessary. There is no basis in the statute for requiring employees to pay fees and costs.

Section 24.7 Recommended Decision and Order

Proposed § 24.7 (formerly § 24.6), concerning recommended decisions and orders, added the statutory requirement that interim relief be ordered in ERA

cases once an administrative law judge issues a recommended decision that the complaint is meritorious. Proposed § 24.7 also provided with respect to all whistleblower cases that the recommended decision of the administrative law judge becomes the final order of the Secretary if no petition for review is filed.

Two commenters challenge the constitutionality of the provision in § 24.7 for an award of compensatory damages upon a finding of a violation, urging that only a jury can make such an award.

The regulation merely tracks the statutory provision that compensatory damages are available as a remedy. DOL, as the agency given the administrative authority to implement that statutory provision, has no authority to question the constitutionality of the statute. Furthermore, Congress has the authority to create a statutory cause of action analogous to a common-law legal claim and assign resolution to an administrative or other tribunal where jury proceedings are not available, provided the adjudication is of a public right—broadly defined to include “a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–55, 54 (1989), quoting from *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593–94 (1985) (Brennan, J., concurring).

Three commenters believe that the 20 days allotted for issuance of the ALJ's decision and order is too short, taking into account such factors as the time necessary to prepare hearing transcripts and post-hearing briefs.

The Department considers the 20-day time period necessary, like the other time periods in the regulations, because of the overall time period in the statute of 90 days from complaint to Secretary's decision. In a particular case, in accordance with current practice, the parties may agree to extend the period for a hearing or decision and order, and the regulations have been amended to so provide.

Two commenters argue that the provision in § 24.7(c)(1) requiring interim relief for the employee upon a finding by an ALJ of a violation should include a hearing before the ALJ on the issue of interim relief. Reinstatement should only be available if a violation is proven.

The purpose of interim relief, to provide a meritorious complainant with a speedy remedy, would be frustrated if a second hearing were required. Due

process requirements will have been fully satisfied by the ALJ hearing already provided by the statute and regulations. Moreover, the statute explicitly provides that a preliminary order of reinstatement (and other relief) shall be issued upon the conclusion of the ALJ hearing and issuance of a recommended decision that the complaint has merit. 42 U.S.C. 5851(b)(2)(A). Clearly nothing further is required. The regulation has been modified to make it clear that preliminary relief is required only if a violation of the Act has been established.

Section 24.8 Review by the Secretary (ARB)

A new proposed § 24.8 detailed the procedure for seeking review by the Secretary of a decision of an Administrative Law Judge.

Two commenters question whether review by the Secretary (now the ARB) of an ALJ's decision is a matter of right or is discretionary, and, if the latter, what criteria the Secretary would use in exercising that discretion. Clarification was also requested of the content of the petition for review.

The intent of the regulations is that appeals be a matter of right, and not discretionary with the ARB. It is not required that the petition for review have any particular form.

One commenter states that in order to avoid frivolous complaints and abusive litigation tactics, the regulations should provide for the Secretary's discretionary awarding of compensation against any losing party guilty of such actions.

The whistleblower statutes do not provide for that form of relief. The relief described in § 24.8(d) as potentially available for successful complainants is the only relief provided by the statute.

Miscellaneous Provisions

The proposed regulations removed § 24.7, concerning judicial review, and former § 24.8, concerning enforcement of decisions of the Secretary. These provisions vary from statute to statute among the whistleblower programs. Furthermore, the types of judicial review or enforcement actions which are available does not need to be the subject of rulemaking since they are prescribed by statute and concern judicial remedies.

One commenter has expressed concern that removal of the former § 24.7(c), in which the Secretary is directed to prepare the record of a case in the event of judicial review, could interfere with the judicial review process.

The Department is of the view that it is unnecessary to have a regulation describing the manner in which the record is filed with the court. When judicial review is sought in the court of appeals, the Department follows Rule 17(b) of the Federal Rules of Appellate Procedure, which provides a number of alternative procedures for filing the record.

As one commenter suggested, and as discussed above, the provisions of former § 24.9, which were inadvertently omitted from the proposed rule, have been reinstated in the regulation.

Dates of Applicability

Two commenters read the regulations as applicable to complaints filed under the ERA prior to the October 1992 ERA Amendments.

Section 2902(i) of the 1992 Amendments, Public Law 102–486, provides:

“The amendments made by this section shall apply to claims filed under section 211(b)(1) of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(b)(1)) on or after the date of the enactment of this Act.”

The date of the enactment of that Act is October 24, 1992, so the regulatory provisions implementing the 1992 ERA Amendments apply only to ERA complaints filed on or after that date.

Furthermore, as discussed above, the delegation of authority to the Assistant Secretary for Occupational Safety and Health is effective only with respect to complaints received on or after February 3, 1997.

In all other respects, the provisions of this part are applicable to actions taken on or after the effective date.

Executive Order 12866; Section 202 of the Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act; Executive Order 12875

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866. Because it is procedural in nature, it will not: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal

mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared. Similarly, because the rule is not economically significant, it is not a major rule within the meaning of Section 804(2) of the Small Business Regulatory Enforcement Fairness Act, and does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995. Finally, these regulations will not result in any increased costs to State, local or tribal governments and therefore are not subject to Executive Order 12875.

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 implements procedural revisions necessitated by statutory amendments and provisions which improve the procedures for speedier resolution of whistleblower complaints. The Department of Labor certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Therefore, no regulatory flexibility analysis is required.

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

List of Subjects in 29 CFR Part 24

Administrative practice and procedure, Employment, Environmental protection, Investigations, Reporting and recordkeeping requirements, Whistleblowing.

Signed at Washington, DC, this 30th day of January 1998.

Charles N. Jeffress,

Acting Assistant Secretary for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble, and under the delegation of authority in Secretary's Order 6-96 (62 FR 111, Jan. 2, 1997, as corrected by 62 FR 8085, Feb. 21, 1997), 29 CFR part 24 is revised to read as follows:

PART 24—PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER FEDERAL EMPLOYEE PROTECTION STATUTES

Sec.

- 24.1 Purpose and scope.
- 24.2 Obligations and prohibited acts.
- 24.3 Complaint.
- 24.4 Investigations.
- 24.5 Investigations under the Energy Reorganization Act.

24.6 Hearings.

24.7 Recommended decision and order.

24.8 Review by the Administrative Review Board.

24.9 Exception.

Appendix A to Part 24—Your Rights Under the Energy Reorganization Act.

Authority: 15 U.S.C. 2622; 33 U.S.C. 1367; 42 U.S.C. 300j-9(i), 5851, 6971, 7622, 9610.

§ 24.1 Purpose and scope.

(a) This part implements the several employee protection provisions for which the Secretary of Labor has been given responsibility pursuant to the following Federal statutes: Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974, 42 U.S.C. 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.

(b) Procedures are established by this part pursuant to the Federal statutory provisions listed in paragraph (a) of this section, for the expeditious handling of complaints by employees, or persons acting on their behalf, of discriminatory action by employers.

(c) Throughout this part, "Secretary" or "Secretary of Labor" shall mean the Secretary of Labor, U.S. Department of Labor, or his or her designee. "Assistant Secretary" shall mean the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, or his or her designee.

§ 24.2 Obligations and prohibited acts.

(a) No employer subject to the provisions of any of the Federal statutes listed in § 24.1(a), or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, 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 this section.

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any

requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

(c) Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in § 24.1(a), any employer is deemed to have violated the particular federal law and these regulations if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Notified the employer of an alleged violation of such Federal statute or the AEA of 1954;

(2) Refused to engage in any practice made unlawful by such Federal statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or

(3) Testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of such Federal statute or the AEA of 1954.

(d)(1) Every employer subject to the Energy Reorganization Act of 1974, as amended, shall prominently post and keep posted in any place of employment to which the employee protection provisions of the Act apply a fully legible copy of the notice prepared by the Occupational Safety and Health Administration, printed as appendix A to this part, or a notice approved by the Assistant Secretary for Occupational Safety and Health that contains substantially the same provisions and explains the employee protection provisions of the Act and the regulations in this part. Copies of the notice prepared by DOL may be obtained from the Assistant Secretary for Occupational Safety and Health, Washington, D.C. 20210, from local offices of the Occupational Safety and Health Administration, or from the Department of Labor's Website at <http://www.osha.gov>.

(2) Where the notice required by paragraph (d)(1) of this section has not been posted, the requirement in § 24.3(b)(2) that a complaint be filed with the Assistant Secretary within 180 days of an alleged violation shall be inoperative unless the respondent establishes that the complainant had notice of the material provisions of the notice. If it is established that the notice was posted at the employee's place of employment after the alleged discriminatory action occurred or that

the complainant later obtained actual notice, the 180 days shall ordinarily run from that date.

§ 24.3 Complaint.

(a) *Who may file.* An employee who believes that he or she has been discriminated against by an employer in violation of any of the statutes listed in § 24.1(a) may file, or have another person file on his or her behalf, a complaint alleging such discrimination.

(b) *Time of filing.* (1) Except as provided in paragraph (b)(2) of this section, any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing.

(2) Under the Energy Reorganization Act of 1974, any complaint shall be filed within 180 days after the occurrence of the alleged violation.

(c) *Form of complaint.* No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation.

(d) *Place of filing.* A complaint may be filed in person or by mail at the nearest local office of the Occupational Safety and Health Administration, listed in most telephone directories under U.S. Government, Department of Labor. A complaint may also be filed with the Office of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, D.C. 20210.

(Approved by the Office of Management and Budget under control number 1215-0183.)

§ 24.4 Investigations.

(a) Upon receipt of a complaint under this part, the Assistant Secretary shall notify the person named in the complaint, and the appropriate office of the Federal agency charged with the administration of the affected program of its filing.

(b) The Assistant Secretary shall, on a priority basis, investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.

(c) Investigations under this part shall be conducted in a manner which

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.

(d)(1) Within 30 days of receipt of a complaint, the Assistant Secretary shall complete the investigation, determine whether the alleged violation has occurred, and give notice of the determination. The notice of determination shall contain a statement of reasons for the findings and conclusions therein and, if the Assistant Secretary determines that the alleged violation has occurred, shall include an appropriate order to abate the violation. Notice of the determination shall be given by certified mail to the complainant, the respondent, and their representatives (if any). At the same time, the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, the original complaint and a copy of the notice of determination.

(2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

(3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

§ 24.5 Investigations under the Energy Reorganization Act.

(a) In addition to the investigation procedures set forth in § 24.4, this section sets forth special procedures applicable only to investigations under the Energy Reorganization Act.

(b)(1) A complaint of alleged violation shall be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct as provided in § 24.2(b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to meet the required elements of a *prima facie* case, as follows:

(i) The employee engaged in a protected activity or conduct, as set forth in § 24.2;

(ii) The respondent knew that the employee engaged in the protected activity;

(iii) The employee has 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.

(3) 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 elements of a *prima facie* case, i.e., to give rise to an inference that the respondent knew 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 it is shown 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 these elements are not substantiated in the investigation, the investigation will cease.

(c)(1) Notwithstanding a finding that a complainant has made a *prima facie* showing required by this section with respect to complaints filed under the Energy Reorganization Act, an investigation of the complainant's complaint under that Act shall be discontinued if the respondent 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.

(2) Upon receipt of a complaint under the Energy Reorganization Act, the respondent shall be provided with a copy of the complaint (as supplemented by interviews of the complainant, if any) and advised that any evidence it may wish to submit to rebut the allegations in the complaint must be received within five business days from receipt of notification of the complaint. If the respondent fails to make a timely response or if the response does not demonstrate by clear and convincing evidence that the unfavorable action would have occurred absent the protected conduct, the investigation shall proceed. The investigation shall proceed whenever it is necessary or appropriate to confirm or verify the information provided by respondent.

(d) Whenever the Assistant Secretary dismisses a complaint pursuant to this section without completion of an investigation, the Assistant Secretary shall give notice of the dismissal, which shall contain a statement of reasons therefor, by certified mail to the complainant, the respondent, and their representatives. At the same time the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and a copy of the notice of dismissal. The notice of dismissal shall constitute a notice of determination within the meaning of § 24.4(d), and any request for a hearing shall be filed and served in accordance with the provisions of § 24.4(d) (2) and (3).

§ 24.6 Hearings.

(a) *Notice of hearing.* The administrative law judge to whom the case is assigned shall, within seven calendar days following receipt of the request for hearing, notify the parties by certified mail, directed to the last known address of the parties, of a day, time and place for hearing. All parties shall be given at least five days notice of such hearing. However, because of the time constraints upon the Secretary by the above statutes, no requests for postponement shall be granted except for compelling reasons or with the consent of all parties.

(b) *Consolidated hearings.* When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his own or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as

introduced in the others, and a separate or joint decision shall be made, as appropriate.

(c) *Place of hearing.* The hearing shall, where possible, be held at a place within 75 miles of the complainant's residence.

(d) *Right to counsel.* In all proceedings under this part, the parties shall have the right to be represented by counsel.

(e) *Procedures, evidence and record—*

(1) *Evidence.* 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.

(2) *Record of hearing.* All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(3) *Oral argument; briefs.* Any party, upon request, may be allowed a reasonable time for presentation of oral argument and to file a prehearing brief or other written statement of fact or law. A copy of any such prehearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge and shall be due within the time prescribed by the administrative law judge.

(4) *Dismissal for cause.* (i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim:

(A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause; or

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an

order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim, defense or party.

(f)(1) At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or 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 recommended decision of an administrative law judge, including a decision based on a settlement agreement between complainant and respondent, 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, shall 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, D.C. 20210.

(g)(1) A Federal agency which is interested in a proceeding may participate as *amicus curiae* at any time in the proceedings, at the agency's discretion.

(2) At the request of a Federal agency which is interested in a proceeding, copies of all pleadings in a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

§ 24.7 Recommended decision and order.

(a) Unless the parties jointly request or agree to an extension of time, the administrative law judge shall issue a recommended decision within 20 days after the termination of the proceeding at which evidence was submitted. The recommended decision shall contain appropriate findings, conclusions, and a recommended order and be served upon all parties to the proceeding.

(b) In cases under the Energy Reorganization Act, 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 respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The proceeding before the

administrative law judge shall be a proceeding on the merits of the complaint. Neither the Assistant Secretary's determination to dismiss a complaint pursuant to § 24.5 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 such a determination to dismiss was made in error.

(c)(1) Upon the conclusion of the hearing and the issuance of a recommended decision that the complaint has merit, and that a violation of the Act has occurred, the administrative law judge shall issue a recommended order that the respondent take appropriate affirmative action to abate the violation, including reinstatement of the complainant to his or her former position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate.

(2) In cases brought under the Energy Reorganization Act, when an administrative law judge issues a recommended order that the complaint has merit and containing the relief prescribed in paragraph (c)(1) of this section, the administrative law judge shall also issue a preliminary order providing all of the relief specified in paragraph (c)(1) of this section with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately, whether or not a petition for review is

filed with the Administrative Review Board. Any award of compensatory damages shall not be effective until the final decision is issued by the Administrative Review Board.

(d) The recommended decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to § 24.8, a petition for review is timely filed with the Administrative Review Board.

§ 24.8 Review by the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the recommended decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the recommended decision, except that for cases arising under the Energy Reorganization Act of 1974, a preliminary order of relief shall be effective while review is conducted by the Board.

(b) Copies of the petition for review and all briefs shall 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, D.C. 20210.

(c) The final decision shall be issued within 90 days of the receipt of the complaint and shall be served upon all parties and the Chief Administrative Law Judge by mail to the last known address.

(d)(1) 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 reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate.

(2) If such a final order is issued, the Board, at the request of the complainant, shall assess against the respondent a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant, as determined by the Board, for, or in connection with, the bringing of the complaint upon which the order was issued.

(e) If the Board determines that the party charged has not violated the law, an order shall be issued denying the complaint.

§ 24.9 Exception.

This part shall have no application to any employee alleging activity prohibited by this part who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of a Federal statute listed in § 24.1(a).

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Appendix A to Part 24—Your Rights Under the Energy Reorganization Act

YOUR RIGHTS UNDER THE ERA

THE ENERGY REORGANIZATION ACT (ERA), MAKES IT ILLEGAL FOR AN EMPLOYER COVERED BY THE ACT -- INCLUDING A LICENSEE OF THE NUCLEAR REGULATORY COMMISSION (NRC) OR AN AGREEMENT STATE, AN APPLICANT FOR A LICENSE, A CONTRACTOR OR SUBCONTRACTOR OF A LICENSEE OR APPLICANT AND A CONTRACTOR OR SUBCONTRACTOR OF THE DEPARTMENT OF ENERGY (DOE) UNDER THE ATOMIC ENERGY ACT (AEA) -- TO DISCHARGE OR OTHERWISE DISCRIMINATE AGAINST AN EMPLOYEE IN TERMS OF COMPENSATION, CONDITIONS OR PRIVILEGES OF EMPLOYMENT BECAUSE THE EMPLOYEE OR ANY PERSON ACTING AT AN EMPLOYEE'S REQUEST PERFORMS A PROTECTED ACTIVITY.

RIGHT TO RAISE A SAFETY CONCERN: YOU ARE ENGAGED IN PROTECTED ACTIVITY WHEN YOU:

- (1) NOTIFY YOUR EMPLOYER OF AN ALLEGED VIOLATION OF THE ERA OR THE AEA;
- (2) REFUSE TO ENGAGE IN ANY PRACTICE MADE UNLAWFUL BY THE ERA OR THE AEA, IF YOU HAVE IDENTIFIED THE ALLEGED ILLEGALITY TO THE EMPLOYER;
- (3) TESTIFY BEFORE CONGRESS OR AT ANY FEDERAL OR STATE PROCEEDING REGARDING ANY PROVISION OR PROPOSED PROVISION OF THE ERA OR THE AEA;
- (4) COMMENCE OR CAUSE TO BE COMMENCED A PROCEEDING UNDER THE ERA, OR A PROCEEDING FOR THE ADMINISTRATION OR ENFORCEMENT OF ANY REQUIREMENT IMPOSED UNDER THE ERA;
- (5) TESTIFY OR ARE ABOUT TO TESTIFY IN ANY SUCH PROCEEDING; OR
- (6) ASSIST OR PARTICIPATE IN SUCH A PROCEEDING OR IN ANY OTHER ACTION TO CARRY OUT THE PURPOSES OF THE ERA OR THE AEA.

UNLAWFUL ACTS BY EMPLOYERS: IT IS UNLAWFUL FOR AN EMPLOYER TO INTIMIDATE, THREATEN, RESTRAIN, COERCE, BLACKLIST, DISCHARGE OR IN ANY OTHER MANNER DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE THE EMPLOYEE HAS ENGAGED IN PROTECTED ACTIVITY.

COMPLAINT: AN EMPLOYEE OR EMPLOYEE REPRESENTATIVE MAY FILE A COMPLAINT CHARGING DISCRIMINATION IN VIOLATION OF THE ERA WITHIN 180 DAYS OF THE DISCRIMINATORY ACTION. A COMPLAINT MUST BE IN WRITING AND SHOULD INCLUDE A FULL STATEMENT OF FACTS, INCLUDING THE PROTECTED ACTIVITY ENGAGED IN BY THE EMPLOYEE, KNOWLEDGE BY THE EMPLOYER OF THE PROTECTED ACTIVITY, AND THE BASIS FOR BELIEVING THAT THE ACTIVITY RESULTED IN DISCRIMINATION AGAINST THE EMPLOYEE BY THE EMPLOYER. A COMPLAINT MAY BE FILED IN PERSON OR BY MAIL AT THE NEAREST LOCAL OFFICE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA), U.S. GOVERNMENT, DEPARTMENT OF LABOR, OR WITH THE OFFICE OF THE ASSISTANT SECRETARY, OSHA, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C. 20210.

ENFORCEMENT: OSHA WILL REVIEW THE COMPLAINT TO ENSURE THAT IT MAKES AN INITIAL SHOWING OF DISCRIMINATION. IF NOT, OR IF THE EMPLOYER PROVIDES CLEAR AND CONVINCING EVIDENCE THAT THERE WAS NO DISCRIMINATION, THERE WILL BE NO INVESTIGATION. IF THE REQUIRED SHOWING IS MADE, OSHA WILL NOTIFY THE EMPLOYER AND CONDUCT AN INVESTIGATION TO DETERMINE WHETHER A VIOLATION HAS OCCURRED. EITHER THE EMPLOYEE OR THE EMPLOYER MAY REQUEST A HEARING BEFORE AN ALJ.

RELIEF: IF DISCRIMINATION IS FOUND, THE EMPLOYER WILL BE REQUIRED TO PROVIDE APPROPRIATE RELIEF, INCLUDING REINSTATEMENT (EVEN FOR THE PERIOD BETWEEN THE ALJ DECISION AND APPEAL), BACK WAGES OR COMPENSATION FOR INJURY SUFFERED FROM THE DISCRIMINATION, AND ATTORNEY'S FEES AND COSTS.

CAUTION: THE PRECEDING PROTECTIONS AND REMEDIES ARE NOT AVAILABLE TO EMPLOYEES WHO ENGAGE IN DELIBERATE VIOLATIONS OF THE ERA OR THE AEA.

FOR ADDITIONAL INFORMATION: CONTACT THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. GOVERNMENT, DEPARTMENT OF LABOR (LISTED IN TELEPHONE DIRECTORIES), OR SEE THE DEPARTMENT OF LABOR'S WEB SITE AT: WWW.OSHA.GOV

EMPLOYERS ARE REQUIRED TO DISPLAY THIS POSTER WHERE EMPLOYEES CAN READILY SEE IT.