

(e) The complaint deals with “terms and conditions of employment” within the meaning of the National Labor Relations Act, except as provided in Sec. 708.5.

Subpart B - Procedures

§ 708.5 What employee conduct is protected from retaliation by an employer?

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals—

(1) A substantial violation of a law, rule, or regulation;

(2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to Sec. 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would—

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

§ 708.6 What constitutes “a reasonable fear of serious injury?”

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if:

(a) A reasonable person, under the circumstances that confronted the employee, would conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or

(b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

§ 708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?

You may file a complaint for retaliation or refusing to participate in an activity, policy, or practice only if:

(a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and

(b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your

employer, or any higher tier contractor, and stated your reasons for refusing to participate.

§ 708.8 Does this part apply to pending cases? The procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.

§ 708.9 When is a complaint or other document considered to be “filed” under this part?

Under this part, a complaint or other document is considered “filed” on the date it is mailed or on the date it is personally delivered to the specified official or office.

§ 708.10 Where does an employee file a complaint?

(a) If you were employed by a contractor whose contract is handled by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, you must file two copies of your written complaint with the EC Director.

(b) If you were employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, you must file two copies of your written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.

§ 708.11 Will an employee's identity be kept confidential if the employee so requests?

No. The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the contractor and it becomes a public document.

§ 708.12 What information must an employee include in a complaint? Your complaint does not need to be in any specific form but must be signed by you and contain the following:

(a) A statement specifically describing

(1) The alleged retaliation taken against you and

(2) The disclosure, participation, or refusal that you believe gave rise to the retaliation;

(b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in Sec. 708.15 of this subpart;

(c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and

(d) An affirmation, as described in Sec. 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

§708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?

(a) To show that you have exhausted all applicable grievance- arbitration procedures, you must:

(1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and

provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or

(2) State that you filed a grievance under applicable grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that you filed your grievance; or

(3) State that your employer has established no grievance-arbitration procedures.

(b) If you do not provide the information specified in Sec. 708.13(a), your complaint may be dismissed for lack of jurisdiction as provided in Sec. 708.17 of this subpart.

§ 708.14 How much time does an employee have to file a complaint?

(a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint you file under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

§ 708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) Your complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) Your complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or

(3) You have exhausted grievance-arbitration procedures pursuant to Sec. 708.13, and issues related to alleged retaliation for conduct protected under Sec. 708.5 remain.

(b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent you from filing a complaint under this part.

(c) You are considered to have filed a complaint under State or other

applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under Sec. 708.17(c)(3).

Department of Energy
Whistleblower Enforcement Policy
10 C.F.R. Part 820 App.A (XIII)

(a) DOE contractors may not retaliate against any employee because the employee has disclosed information, participated in activities or refused to participate in activities listed in 10 CFR 708.5 (a)-(c) as provided by 10 CFR 708.43. DOE contractor employees may seek remedial relief for allegations of retaliation from the DOE Office of Hearings and Appeals (OHA) under 10 CFR part 708 (Part 708) or from the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24.

(b) An act of retaliation by a DOE contractor, proscribed under 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a)-(c) concerning nuclear safety in connection with a DOE nuclear activity, may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 (Part 820). The retaliation may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708. The same facts that support remedial relief to employees under Part 708 may be used by the Director of the Office of Investigation and Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24-820.25.

(c) When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor retaliation against a contractor employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee's action concerning a DOE nuclear activity.

(d) The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a FNOV. 10 CFR 820.25.

(e) The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

(f) Normally, the Director will await the completion of a Part 708 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 708 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

(g) DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

(h) In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

(i) In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 708 or sec. 211 proceeding. Egregious cases would include:

(1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and

(2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

(j) When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under Part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 708.

(k) At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation proceedings. The nuclear safety rules include: 10 CFR part 830 (nuclear safety management); 10 CFR part 835 (occupational radiation protection); and 10 CFR part 820.11 (information accuracy requirements).

**Memorandum of Understanding Between the
Nuclear Regulatory Commission and the
Department of Labor
(Employee protection)
October 21, 1998**

Summary: The Nuclear Regulatory Commission and the Department of Labor entered into a revised Memorandum of Understanding (MOU), effective September 9, 1998. The purpose of the MOU is to facilitate coordination and cooperation concerning the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851. Both agencies agree that administrative efficiency and sound enforcement policies will be maximized by this cooperation and the timely exchange of information in areas of mutual interest. The text of the MOU is set forth below.

FOR FURTHER INFORMATION CONTACT: Mr. Edward T. Baker, telephone 301-415-8529. Office of Nuclear Reactor Regulation, MS O-5E-7, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

Dated at Rockville, Maryland, this 21st day of October 1998.

For the Nuclear Regulatory Commission.

Edward T. Baker III,

Agency Allegation Advisor, Office of Nuclear Reactor Regulation.

(1) Purpose

The U.S. Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) enter into this agreement to facilitate coordination and cooperation concerning the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. 5851.

(2) Background

Section 211 of the ERA prohibits any employer, including a Nuclear Regulatory Commission licensee, license applicant or a contractor or subcontractor of a Commission licensee or applicant, from discriminating against any employee with respect to his or her compensation, terms, conditions or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner in any action to carry out the purposes of either the ERA or the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. 2011 et sec.

The NRC and DOL have complementary responsibilities in the area of employee protection. DOL has the responsibility under Section 211 of the ERA to investigate employee complaints of discrimination and may, after an investigation or hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. NRC, although without authority to provide a remedy to an employee, has independent authority under the AEA to take appropriate enforcement action against Commission applicants and licensees and their contractors that violate the AEA or Commission requirements, (i.e., 10 CFR 50.7 and similar requirements in other parts of Title 10 of the Code of Federal Regulations) which prohibit

discrimination against employees based on their engaging in protected activities. NRC enforcement action may include issuance of a Notice of Violation to the responsible applicant, licensee, contractor, and/or individual; imposition of a civil penalty; issuance of an order removing the responsible individual from licensed activities; and/or license denial, suspension, modification or revocation.

Although each agency will carry out its statutory responsibilities independently, the agencies agree that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

(3). Areas of Cooperation

(a) DOL agrees to promptly notify NRC of any complaint filed with DOL alleging discrimination within the scope of Section 211 of the ERA by a Commission licensee, applicant or a contractor or subcontractor of a Commission licensee or applicant. DOL will provide a quarterly listing of Section 211 complaints received. DOL will promptly provide NRC a copy of all complaints, decisions made prior to a hearing, investigation reports, and orders associated with any hearing or administrative appeal on the complaint. DOL will also cooperate with the NRC and shall keep the NRC informed on the status of any judicial proceedings seeking review of an order of DOL's Administrative Review Board issued in a proceeding under Section 211 of the ERA.

(b) NRC and DOL agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, license applicants, or contractors or subcontractors of Commission licensees or applicants. Every agency agrees to share all information it obtains concerning a particular complaint of discrimination and, to the extent permitted by law, will protect information identified as sensitive that has been supplied to it by the other agency. This cooperation does not require either agency to share information gathered during an investigation until the investigation is complete.

(c) For cases in which the NRC completes its investigation of a Section 211 complaint, and DOL's investigation is still ongoing, the NRC will provide the results of its investigation to the appropriate Occupational Safety & Health Administration (OSHA) contact, subject to Department of Justice (DOJ) constraints on the timing of the release of NRC investigation material. NRC will take all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances. Consistent with relevant statutes, NRC regulations, and the availability of NRC resources, the NRC will cooperate with DOL and make available information, agency positions, and agency witnesses as necessary to assist DOL in completing the adjudication record on complaints filed under Section 211.

(d) If the NRC receives a complaint concerning a possible violation of Section 211, it will inform the complainant that a personal remedy is available only through DOL and that the person must personally contact DOL in order to file a complaint. NRC will provide the complainant the local address and phone number of the OSHA office and advise the complainant that OSHA must receive the complaint within 180 days of the alleged discrimination.

(e) Each agency shall designate and maintain points of contact within its headquarters and regional offices for purposes of implementation of the MOU. Matters affecting program and policy issues will be handled by the headquarters offices of the agencies.

(4) Implementation

The NRC official responsible for implementation of this agreement is the Chairman of the NRC. The DOL official responsible for implementation of this agreement is the Secretary of Labor.

(5) Amendment and Termination

This Agreement may be amended or modified upon written agreement by both parties to the Agreement. The Agreement may be terminated upon ninety (90) days written notice by either party.

(6) Effective Date

This agreement is effective when signed by both parties.

Shirley Ann Jackson,

Chairman, U.S. Nuclear Regulatory Commission.

Dated: September 1, 1998.

Alexis Herman,

Secretary of Labor, U.S. Department of Labor.

Dated: September 9, 1998.

Nuclear Regulatory Commission

Policy Statement

Freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation

May 14, 1996

Summary: The Nuclear Regulatory Commission (NRC) is issuing this policy statement to set forth its expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. The responsibility for maintaining such an environment rests with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. This policy statement is applicable to NRC regulated activities of all NRC licensees and their contractors and subcontractors.

FOR FURTHER INFORMATION CONTACT:

James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, (301) 415-2741.

SUPPLEMENTARY INFORMATION:

Background: NRC licensees have the primary responsibility to ensure the safety of nuclear operations. Identification and communication of potential safety concerns and the freedom of employees to raise such concerns is an integral part of carrying out this responsibility.

(1) Throughout this Policy Statement the terms “concerns,” “safety concerns” and “safety problem” refer to potential or actual issues within the Commission's jurisdiction involving operations, radiological releases, safeguards, radiation protection, and other matters relating to NRC-

regulated activities. In the past, employees have raised important issues and as a result, the public health and safety has benefited. Although the Commission recognizes that not every concern raised by employees is safety significant or, for that matter, is valid, the Commission concludes that it is important that licensees' management establish an environment in which safety issues are promptly identified and effectively resolved and in which employees feel free to raise concerns. Although hundreds of concerns are raised and resolved daily in the nuclear industry, the Commission, on occasion, receives reports of individuals being retaliated against for raising concerns. This retaliation is unacceptable and unlawful. In addition to the hardship caused to the individual employee, the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage other workers from raising concerns. Reluctance on the part of employees to raise concerns is detrimental to nuclear safety. As a result of questions raised about NRC's efforts to address retaliation against individuals who raise health and safety concerns, the Commission established a review team in 1993 to reassess the NRC's program for protecting allegers against retaliation. In its report (NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," January 7, 1994) the review team made numerous recommendations, including several recommendations involving issuing a policy statement to address the need to encourage responsible licensee action with regard to fostering a quality-conscious environment in which employees are free to raise safety concerns without fear of retribution (recommendations II.A-1, II.A-2, and II.A-4). On February 8, 1995, the Commission after considering those recommendations and the bases for them published for comment a proposed policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," in the Federal Register (60 FR 7592, February 8, 1995). The proposed policy statement generated comments from private citizens and representatives of the industry concerning both the policy statement and NRC and Department of Labor (DOL) performance. The more significant comments related to the contents of the policy statement included:

1. The policy statement would discourage employees from bringing their concerns to the NRC because it provided that employees should normally provide concerns to the licensee prior to or contemporaneously with coming to the NRC.
2. The use of a holding period should be at the discretion of the employer and not be considered by the NRC in evaluating the reasonableness of the licensee's action.
3. The policy statement is not needed to establish an environment to raise concerns if NRC uses its authority to enforce existing requirements by pursuing civil and criminal sanctions against those who discriminate.
4. The description of employee concerns programs and the oversight of contractors was too prescriptive; the expectations concerning oversight of contractors were perceived as the imposition of new requirements without adherence to the Administrative Procedure Act and the NRC's Backfit Rule, 10 CFR 50.109.5.
5. The need for employee concerns programs (ECPs) was questioned, including whether the ECPs fostered the development of a strong safety culture.
6. The suggestion for involvement of senior management in resolving discrimination

complaints was too prescriptive and that decisions on senior management involvement should be decided by licensees. In addition, two public meetings were held with representatives of the Nuclear Energy Institute (NEI) to discuss the proposed policy statement. Summaries of these meetings along with a revised policy statement proposed by NEI were included with the comments to the policy statement filed in the Public Document Room (PDR). This policy statement is being issued after considering the public comments and coordination with the Department of Labor. The more significant changes included:

1. The policy statement was revised to clarify that senior management is expected to take responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved as opposed to being personally involved in the resolution of these matters.
2. References to maintenance of a "quality-conscious environment" have been changed to "safety-conscious environment" to put the focus on safety.
3. The policy statement has been revised to emphasize that while alternative programs for raising concerns may be helpful for a safety-conscious environment, the establishment of alternative programs is not a requirement.
4. The policy statement continues to emphasize licensees' responsibility for their contractors. This is not a new requirement. However, the policy statement was revised to provide that enforcement decisions against licensees for discriminatory conduct of their contractors would consider such things as the relationship between the licensee and contractor, the reasonableness of the licensee's oversight of the contractor's actions and its attempts to investigate and resolve the matter.
5. To avoid the possibility suggested by some commenter's that the policy statement might discourage employees from raising concerns to the NRC if the employee is concerned about retaliation by the employer, the statement that reporting concerns to the Commission "except in limited fact-specific situations" would not absolve employees of the duty to inform the employer of matters that could bear on public, including worker, health and safety has been deleted, however, the policy statement expresses the Commission's expectation that employees, when coming to the NRC, should normally have provided the concern to the employer prior to or contemporaneously with coming to the NRC.

Statement of Policy

The purpose of this Statement of Policy is to set forth the Nuclear Regulatory Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their own management and the NRC without fear of retaliation. A safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities.

This policy statement and the principles set forth in it are intended to apply to licensed activities of all NRC licensees and their contractors, although it is recognized that some of the suggestions, programs, or steps that might be taken to improve the quality of the work environment (e.g., establishment of a method to raise concerns outside the normal management structure such as an employee concerns program) may not be practical for very small licensees that have only a few employees and

a very simple management structure. Throughout this Notice, the term “licensee” includes licensees and applicants for licenses. It also refers to holders of certificates of compliance under 10 CFR Part 76. The term “contractor” includes contractors and subcontractors of NRC licensees and applicants defined as employers by section 211(a)(2) of the Energy Reorganization Act of 1974, as amended. The Commission believes that the most effective improvements to the environment for raising concerns will come from within a licensee's organization (or the organization of the licensee's contractor) as communicated and demonstrated by licensee and contractor management. Management should recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns. As the Commission noted in its 1989 Policy Statement on the Conduct of Nuclear Power Plant Operations (54 FR 3424, January 24, 1989), management must provide the leadership that nurtures and maintains the safety environment. In developing this policy statement, the Commission considered the need for:

- (1) Licensees and their contractors to establish work environments, with effective processes for problem identification and resolution, where employees feel free to raise concerns, both to their management and to the NRC, without fear of retaliation;
 - (2) Improving contractors' awareness of their responsibilities in this area;
 - (3) Senior management of licensees and contractors to take the responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved; and
 - (4) Employees in the regulated industry to recognize their responsibility to raise safety concerns to licensees and their right to raise concerns to the NRC. This policy statement is directed to all employers, including licensees and their contractors, subject to NRC authority, and their employees. It is intended to reinforce the principle to all licensees and other employers subject to NRC authority that an act of retaliation or discrimination against an employee for raising a potential safety concern is not only unlawful but may adversely impact safety. The Commission emphasizes that employees who raise concerns serve an important role in addressing potential safety issues. Thus, the NRC cannot and will not tolerate retaliation against employees who attempt to carry out their responsibility to identify potential safety issues.
- (3) An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the Department of Labor if the employee seeks a personal remedy for the discrimination. The person may also file an allegation of discrimination with the NRC. The NRC will focus on licensee actions and does not obtain personal remedies for the individual. Instructions for filing complaints with the DOL and submitting allegations can be found on NRC Form 3 which licensees are required to post.

Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action if discrimination is substantiated. The Commission has promulgated regulations to prohibit discrimination (see,

e.g., 10 CFR 30.7 and 50.7). Under Section 211 of the Energy Reorganization Act of 1974, as amended, the Department of Labor also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred. The NRC may initiate an investigation even though the matter is also being pursued within the DOL process. However, the NRC's determination of whether to do so is a function of the priority of the case which is based on its potential merits and its significance relative to other ongoing NRC investigations.

(4) The NRC and DOL have entered into a Memorandum of Understanding to facilitate cooperation between the agencies. (47 FR 54585; December 3, 1982). *Effective Processes for Problem Identification and Resolution*

Licensees bear the primary responsibility for the safe use of nuclear materials in their various licensed activities. To carry out that responsibility, licensees need to receive prompt notification of concerns as effective problem identification and resolution processes are essential to ensuring safety. Thus, the Commission expects that each licensee will establish a safety-conscious environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees. A safety-conscious environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns. Other attributes of a work place with this type of an environment may include well-developed systems or approaches for prioritizing problems and directing resources accordingly; effective communications among various departments or elements of the licensee's organization for openly sharing information and analyzing the root causes of identified problems; and employees and managers with an open and questioning attitude, a focus on safety, and a positive orientation toward admitting and correcting personnel errors. Initial and periodic training (including contractor training) for both employees and supervisors may also be an important factor in achieving a work environment in which employees feel free to raise concerns. In addition to communicating management expectations, training can clarify for both supervisors and employees options for problem identification. This would include use of licensee's internal processes as well as providing concerns directly to the NRC. Training of supervisors may also minimize the potential perception that efforts to reduce operating and maintenance costs may cause supervisors to be less receptive to employee concerns if identification and resolution of concerns involve significant costs or schedule delays.

(5) Training of supervisors in the value of raising concerns and the use of alternative internal processes may minimize the conflict that can be created when supervisors, especially first line supervisors, perceive employees as "problem employees" if the employees, in raising concerns, bypass the "chain of command." Incentive programs may provide a highly visible method for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost savings but also on their contribution to safety. Credible self assessments

of the environment for raising concerns can contribute to program effectiveness by evaluating the adequacy and timeliness of problem resolution. Self-assessments can also be used to determine whether employees believe their concerns have been adequately addressed and whether employees feel free to raise concerns. When problems are identified through self-assessment, prompt corrective action should be taken. Licensees and their contractors should clearly identify the processes that employees may use to raise concerns and employees should be encouraged to use them. The NRC appreciates the value of employees using normal processes (e.g., raising issues to the employee supervisors or managers or filing deficiency reports) for problem identification and resolution. However, it is important to recognize that the fact that some employees do not desire to use the normal line management processes does not mean that these employees do not have legitimate concerns that should be captured by the licensee's resolution processes. Nor does it mean that the normal processes are not effective. Even in a generally good environment, some employees may not always be comfortable in raising concerns through the normal channels. From a safety perspective, no method of raising potential safety concerns should be discouraged. Thus, in the interest of having concerns raised, the Commission encourages each licensee to have a dual focus:

(1) On achieving and maintaining an environment where employees feel free to raise their concerns directly to their supervisors and to licensee management, and

(2) on ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective. NUREG-1499 may provide some helpful insights on various alternative approaches. The Commission recognizes that what works for one licensee may not be appropriate for another. Licensees have in the past used a variety of different approaches, such as:

(1) An "open-door" policy that allows the employee to bring the concern to a higher-level manager;

(2) A policy that permits employees to raise concerns to the licensee's quality assurance group;

(3) An ombudsman program; or

(4) Some form of an employee concerns program. The success of a licensee alternative program for concerns may be influenced by how accessible the program is to employees, prioritization processes, independence, and provisions to protect the identity of employees including the ability to allow for reporting issues with anonymity, and resources. However, the prime factors in the success of a given program appear to be demonstrated management support and how employees perceive the program. Therefore, timely feedback on the follow-up and resolution of concerns raised by employees may be a necessary element of these programs. This Policy Statement should not be interpreted as a requirement that every licensee establish alternative programs for raising and addressing concerns. Licensees should determine the need for providing alternative methods for raising concerns that can serve as internal "escape valves" or "safety nets." Considerations might include the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee.

While effective alternative programs for identifying and resolving concerns may assist licensees in maintaining a safety-conscious environment, the Commission, by making the suggestion for establishing alternative programs, is not requiring licensees to have such programs. In the absence of a requirement imposed by the Commission, the establishment and framework of alternative programs are discretionary.

(5) In developing these programs, it is important for reactor licensees to be able to capture all potential safety concerns, not just concerns related to "safety-related" activities covered by 10 CFR Part 50, Appendix B. For example, concerns relating to environmental, safeguards, and radiation protection issues should also be captured.

Improving Contractors' Awareness of Their Responsibilities

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation. Nevertheless, certain NRC requirements apply directly to contractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7). Accordingly, if a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee. In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions, the NRC intends to consider, among other things, the relationship of the contractor to the particular licensee and its licensed activities; the reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors; the licensee's involvement in or opportunity to prevent the discrimination; and the licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects. Contractors of licensees have been involved in a number of discrimination complaints that are made by employees. In the interest of ensuring that their contractors establish safety-conscious environments, licensees should consider taking action so that:

(1) Each contractor involved in licensed activities is aware of the applicable regulations that prohibit discrimination;

- (2) Each contractor is aware of its responsibilities in fostering an environment in which employees feel free to raise concerns related to licensed activities;
- (3) The licensee has the ability to oversee the contractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination by obtaining reports of alleged contractor discrimination and associated investigations conducted by or on behalf of its contractors; conducting its own investigations of such discrimination; and, if warranted, by directing that remedial action be undertaken; and
- (4) Contractor employees and management are informed of
 - (a) the importance of raising safety concerns and
 - (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC. Adoption of contract provisions covering the matters discussed above may provide additional assurance that contractor employees will be able to raise concerns without fear of retaliation.

Involvement of Senior Management in Cases of Alleged Discrimination

The Commission reminds licensees of their obligation both to ensure that personnel actions against employees, including personnel actions by contractors, who have raised concerns, have a well-founded, non-discriminatory basis and to make clear to all employees that any adverse action taken against an employee was for legitimate, non-discriminatory reasons. If employees allege retaliation for engaging in protected activities, senior licensee management should be advised of the matter and assure that the appropriate level of management is involved, reviewing the particular facts and evaluating or reconsidering the action. The intent of this policy statement is to emphasize the importance of licensee management taking an active role to promptly resolve situations involving alleged discrimination. Because of the complex nature of labor-management relations, any externally-imposed resolution is not as desirable as one achieved internally. The Commission emphasizes that internal resolution is the licensee's responsibility, and that early resolution without government involvement is less likely to disrupt the work place and is in the best interests of both the licensee and the employee. For these reasons, the Commission's enforcement policy provides for consideration of the actions taken by licensees in addressing and resolving issues of discrimination when the Commission develops enforcement sanctions for violations involving discrimination. (59 FR 60697; November 28, 1994). In some cases, management may find it desirable to use a holding period, that is, to maintain or restore the pay and benefits of the employee alleging retaliation, pending reconsideration or resolution of the matter or pending the outcome of an investigation by the Department of Labor (DOL). This holding period may calm feelings on-site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the action is

being reconsidered or the dispute is being resolved. However, inclusion of the holding period approach in this policy statement is not intended to alter the existing rights of either the licensee or the employee, or be taken as a direction by, or an expectation of, the Commission, for licensees to adopt the holding period concept. For both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary.

A licensee may conclude, after a full review, that an adverse action against an employee is warranted. The Commission recognizes the need for licensees to take action when justified. Commission regulations do not render a person who engages in protected activity immune from discharge or discipline stemming from non-prohibited considerations (see, for example, 10 CFR 50.7(d)). The Commission expects licensees to make personnel decisions that are consistent with regulatory requirements and that will enhance the effectiveness and safety of the licensee's operations.7) When other employees know that the individual who was the recipient of an adverse action may have engaged in protected activities, it may be appropriate for the licensee to let the other employees know, consistent with privacy and legal considerations, that (1) management reviewed the matter and determined that its action was warranted,

(2) the action was not in retaliation for engaging in protected activity and the reason why, and

(3) licensee management continues to encourage them to raise issues. This may reduce any perception that retaliation occurred.

Responsibilities of Employers and Employees

As emphasized above, the responsibility for maintaining a safety-conscious environment rests with licensee management. However, employees in the nuclear industry also have responsibilities in this area. As a general principle, the Commission normally expects employees in the nuclear industry to raise safety and compliance concerns directly to licensees, or indirectly to licensees through contractors, because licensees, and not the Commission, bear the primary responsibility for safe operation of nuclear facilities and safe use of nuclear materials. The licensee, and not the NRC, is usually in the best position and has the detailed knowledge of the specific operations and the resources to deal promptly and effectively with concerns raised by employees. This is another reason why the Commission expects licensees to establish an environment in which employees feel free to raise concerns to the licensees themselves.

(8) The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of Inspector General. Concerns related to fraud, waste or abuse in NRC operations or NRC programs including retaliation against a person for raising such issues should be reported directly to the NRC Office of the Inspector General. The Inspector General's toll-free hotline is 800-233-3497.

Employers have a variety of means to express their expectations that employees raise concerns to them, such as employment contracts, employers' policies and procedures, and certain NRC requirements. In

fact, many employees in the nuclear industry have been specifically hired to fulfill NRC requirements that licensees identify deficiencies, violations and safety issues. Examples of these include many employees who conduct surveillance, quality assurance, radiation protection, and security activities. In addition to individuals who specifically perform functions to meet monitoring requirements, the Commission encourages all employees to raise concerns to licensees if they identify safety issues so that licensees can address them before an event with safety consequences occurs.

(9) Except for the reporting of defects under 10 CFR Part 21 and in the area of radiological working conditions, the Commission has not codified this expectation. Licensees are required by 10 CFR 19.12 to train certain employees in their responsibility to raise issues related to radiation safety.

The Commission's expectation that employees will normally raise safety concerns to their employers does not mean that employees may not come directly to the NRC. The Commission encourages employees to come to the NRC at any time they believe that the Commission should be aware of their concerns. But, while not required, the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC. The Commission cautions licensees that complaints that adverse action was taken against an employee for not bringing a concern to his or her employer, when the employee brought the concern to the NRC, will be closely scrutinized by the NRC to determine if enforcement action is warranted for discrimination.

(10) The Commission intends to protect the identity of individuals who come to the NRC to the greatest extent possible. See "Statement of Policy on Protecting the Identity of Allegers and Confidential Sources." Retaliation against employees engaged in protected activities, whether they have raised concerns to their employers or to the NRC, will not be tolerated. If adverse action is found to have occurred because the employee raised a concern to either the NRC or the licensee, civil and criminal enforcement action may be taken against the licensee and the person responsible for the discrimination. Summary The Commission expects that NRC licensees will establish safety-conscious environments in which employees of licensees and licensee contractors are free, and feel free, to raise concerns to their management and to the NRC without fear of retaliation.

Licensees must ensure that employment actions against employees who have raised concerns have a well-founded, non-discriminatory basis.

When allegations of discrimination arise in licensee, contractor, or subcontractor organizations, the Commission expects that senior licensee management will assure that the appropriate level of management is involved to review the particular facts, evaluate or reconsider the action, and, where warranted, remedy the matter. Employees also have a role in contributing to a safety-conscious environment. Although employees are free to come to the NRC at any time, the Commission expects that employees will normally raise concerns with the involved licensee because the licensee has the primary responsibility for safety and is normally in the best position to promptly and effectively address the

matter. The NRC should normally be viewed as a safety valve and not as a substitute forum for raising safety concerns. This policy statement has been issued to highlight licensees' existing obligation to maintain an environment in which employees are free to raise concerns without retaliation. The expectations and suggestions contained in this policy statement do not establish new requirements. However, if a licensee has not established a safety-conscious environment, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licensee or the NRC, appropriate enforcement action may be taken against the licensee, its contractors, and the involved individual supervisors, for violations of NRC requirements.

The Commission recognizes that the actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns.

Dated at Rockville, Maryland, this 8th day of May, 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

SECTION 5

TRANSPORTATION/AIRLINE SAFETY

**Aviation Investment and Reform Act
for the 21st Century (AIR 21)
49 U.S.C. § 42121**

§ 42121. Protection of employees providing air safety information

(a) *Discrimination Against Airline Employees.* No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or 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 this subtitle or any other law of the United States;

(2) has 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 this subtitle or 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.

(b) *Department of Labor Complaint Procedure.*

(1) *Filing And Notification.* A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) *Investigation; Preliminary Order.*

(A) *In General.* Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of

Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.

(i) Required Showing by Complainant. The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by Employer. Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria For Determination by Secretary. The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final Order.

(A) Deadline For Issuance; Settlement Agreements. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to

- (i)** take affirmative action to abate the violation;
- (ii)** reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
- (iii)** provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) *Frivolous Complaints.* If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorneys fee not exceeding \$1,000.

(4) *Review.*

(A) *Appeal to Court of Appeals.* Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) *Limitation on Collateral Attack.* An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) *Enforcement of Order by Secretary of Labor.* Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) *Enforcement of Order by Parties.*

(A) *Commencement of Action.* A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) *Attorney Fees.* The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) *Mandamus.* Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) *Nonapplicability to Deliberate Violations.* Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such persons agent), deliberately causes a

violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.

(e) *Contractor Defined.* In this section, the term contractor means a company that performs safety-sensitive functions by contract for an air carrier.

Coast Guard Whistleblower Protection Provision
Protection of seamen against discrimination
46 U.S.C. § 2114

(a) An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

(b) A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including —

- (1) restraining violations of this section; and
- (2) reinstatement to the seaman's former position with back pay.
- (3) an award of costs and reasonable attorney's fees to a prevailing plaintiff not exceeding \$1,000; and
- (4) an award of costs and reasonable attorney's fees to a prevailing employer not exceeding \$1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith.

Railway Safety Labor Act
Employee Protection
49 U.S.C. § 20109

(See Section 5.46)

Safe Containers for International Cargo Act,
Employee Protection Provision
46 U.S.C. § 80507

(a) *Prohibition.* No person shall discharge or in any manner discriminate against an employee because the employee has reported the existence of an unsafe container or reported a violation of this chapter to the Secretary or his agents.

(b) *Complaints.* An employee who believes that he has been discharged or discriminated against in violation of this section may, within 60 days after the violation occurs, file a complaint alleging discrimination with the Secretary of Labor.

(c) *Enforcement.* The Secretary of Labor may investigate the complaint and, if he determines that this section has been violated, bring an action in an appropriate United States district court. The district court shall have jurisdiction to restrain violations of subsection (a) of this section and to order appropriate relief, including rehiring and reinstatement of the employee to his former position with back pay.

(d) *Notice to Complainant.* Within 30 days after the receipt of a complaint filed under this section the Secretary of Labor shall notify the complainant of his intended action regarding the complaint.

**Surface Transportation Assistance Act
49 U.S.C. §§ 31101**

§ 31101. Definitions

In this subchapter —

(1) “*commercial motor vehicle*” means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle—

(A) has a gross vehicle weight rating of at least 10,000 pounds;

(B) is designed to transport more than 10 passengers including the driver; or

(C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title.

(2) “*employee*” means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—

(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and

(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

(3) “*employer*” —

(A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but

(B) does not include the Government, a State, or a political subdivision of a State.

(4) “*State*” means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

**Occupational Safety and Health Administration
Department of Labor Part 1978
Rules for Implementing Section 405 of the
Surface Transportation Assistance Act of 1982 (STAA)
29 C.F.R. Part 1978**

Subpart A—Interpretive Rules [Reserved]

Subpart B—Rules of Procedure

Complaints, Investigations, Findings and Preliminary Orders

1978.100 Purpose and scope.

1978.101 Definitions.

1978.102 Filing of discrimination complaint.

1978.103 Investigation.

1978.104 Issuance of findings and preliminary orders.

1978.105 Objections to the findings and the preliminary order.
Litigation

1978.106	Scope of rules; applicability of other rules; notice of hearing.
1978.107	Parties.
1978.108	Captions, titles of cases.
1978.109	Decision and orders.
1978.110	Judicial review.
1978.111	Withdrawal of section 405 complaints, objections, and findings; settlement.
Miscellaneous provisions	
1978.112	Arbitration or other proceedings.
1978.113	Judicial enforcement.
1978.114	Statutory time periods.
1978.115	Special circumstances; waiver of rules.
AUTHORITY: 29 U.S.C. 657(g)(2); 29 U.S.C. 660(c)(2); 49 U.S.C. 31101 and 31105; Secretary of Labor's Order No. 1-90, 55 FR 9033.	
SOURCE: 53 FR 47681, Nov. 25, 1988, unless otherwise noted.	

Complaints, investigations, findings, and preliminary orders

§ 1978.100 Purpose and scope.

(a) This subpart implements the procedural aspects of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 2305, which provides for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

(b) Procedures are established by this subpart pursuant to the statutory provision set forth above for the expeditious handling of complaints of discrimination made by employees, or 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 section 405, investigations, issuance of findings and preliminary orders, objections thereto, litigation before administrative law judges, post-hearing administrative review, withdrawals and settlements, judicial review and enforcement, and deferral to other forums.

§ 1978.101 Definitions.

(a) Act means the Surface Transportation Assistance Act of 1982 (STAA) (49 U.S.C. 2301 et seq.).

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

(c) 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.

(d) Employee means

(1) a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle);

(2) a mechanic;

(3) a freight handler; or

(4) any individual other than an employer; who is employed by a commercial motor carrier and who in the course of his employment

directly affects commercial motor vehicle safety, but such term does not include an employee of the United States, any State, or a political subdivision of a State who is acting within the course of such employment.

(e) Commercial motor carrier means a person who meets the definition of motor carrier found at 49 U.S.C. 10102(13) (Supp. 1987) and motor private carrier found at 49 U.S.C. 10102(16) (Supp. 1987).

(f) OSHA means the Occupational Safety and Health Administration.

(g) Complainant means the employee who filed a section 405 complaint or on whose behalf a complaint was filed.

(h) Named person means the person alleged to have violated section 405.

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

§ 1978.102 Filing of discrimination complaint.

(a) Who may file. An employee may file, or have filed by any person on the employee's behalf, a complaint alleging a violation of section 405.

(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 filing with any OSHA officer or employee is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.

(d) Time for filing.

(1) Section 405(c)(1) provides that an employee who believes that he has been discriminated against in violation of section 405 (a) or (b) “* * * may, within one hundred and eighty days after such alleged violation occurs,” file or have filed by any person on the employee's behalf a complaint with the Secretary.

(2) A major purpose of the 180-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.

(3) However, there are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances, which do not justify a tolling of the 180-day period. The Assistant Secretary will not ordinarily investigate complaints which are determined to be untimely.

(e) Relationship to section 11(c) complaints. A complaint filed by an employee within thirty days of the alleged violation or otherwise timely filed pursuant to section 11(c) of the OSHA Act, which alleges discrimination relating to safety or health, shall be deemed to be a complaint filed under both section 405 and section 11(c). Normal procedures for investigations under both sections will be followed, except as otherwise provided.

(f) Upon receipt of a valid complaint, OSHA shall notify the named person of the filing of the complaint by providing a copy of the complaint,

sanitized to protect witness confidentiality if necessary, and shall also notify the named person of his or her rights under 29 CFR 1978.103 (b) and (c).

§ 1978.103 Investigation.

(a) OSHA shall investigate and gather data concerning the case as it deems appropriate.

(b) Within twenty days of his or her receipt of the complaint the named person may submit to OSHA a written statement and any affidavits or documents explaining or defending his or her position. Within the same twenty days the named person may request a meeting with OSHA to present his or her position. The meeting will be held before the issuance of any findings or preliminary order. At the meeting the named person may be accompanied by counsel and by any persons with information relating to the complaint, who may make statements concerning the case. At such meeting OSHA may present additional allegations of violations which may have been discovered in the course of its investigation.

(c) If, on the basis of information gathered under paragraphs (a) and (b) of this section, OSHA has reasonable cause to believe that the named person has violated the Act and that temporary reinstatement is warranted, prior to the issuance of findings and preliminary order as provided for in § 1978.104, OSHA shall again contact the named person to give him or her notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. The named person shall be given the opportunity to submit a written response, to meet with the investigators and to present statements from rebuttal witnesses. The named person shall present this rebuttal evidence within five days of OSHA's notification pursuant to this subsection, or as soon thereafter as OSHA and the named person can agree, if the interests of justice so require.

§ 1978.104 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within sixty days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the named person or others have discriminated against the complainant in violation of section 405 (a) or (b). If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed in section 405(c)(2)(B). Such 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 party the complainant's costs and expenses (including attorney's fees) reasonably incurred in filing the complaint.

(b) The findings and the preliminary order shall be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order shall inform the parties of the right to object to the

findings and/or the order and shall give the address of the Chief Administrative Law Judge. 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 findings and/or order.

(c) Upon the issuance of findings that there is reasonable cause to believe that a violation has occurred, any pending section 11(c) complaint will be suspended until the section 405 proceeding is completed. When the section 405 proceeding is completed the Assistant Secretary will determine what action, if any, is appropriate on the section 11(c) complaint. If the Assistant Secretary's findings indicate that a violation has occurred, the Assistant Secretary shall make a separate determination as to whether section 11(c) has been violated.

§ 1978.105 Objections to the findings and the preliminary order.

(a) Basic procedures. Within thirty days of receipt of the findings or preliminary order the named person or the complainant, or both, may file objections to the findings or preliminary order providing relief or both and request a hearing on the record. The objection and request shall be in writing and shall state whether the objection is to the findings or the preliminary order or both. Such objection shall also be considered a request for a hearing. The date of the postmark shall be considered to be the date of filing. Objections shall be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC and copies of the objections shall be mailed at the same time to the other parties of record, including the Assistant Secretary's designee who issued the findings and order.

(b) Effective date of findings and preliminary order and failure to object.

(1) The findings and the preliminary order shall be effective thirty days after the named person's receipt thereof, or on the compliance date set forth in the preliminary order, whichever is later, unless an objection to the findings or preliminary order has been timely filed. 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 thereto.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, such findings or preliminary order, as the case may be, shall become final and not subject to judicial review.

§ 1978.106 Scope of rules; applicability of other rules; notice of hearing.

(a) Except as otherwise noted, hearings shall be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges promulgated at 29 CFR part 18, 48 FR 32538 (July 15, 1983), amended at 49 FR 2739 January 20, 1984. Hearings shall be conducted as hearings de novo.

(b) Upon receipt of an objection, the Chief Administrative Law Judge shall immediately assign the case to a judge who shall, within seven days following the receipt of the objection, notify the parties, by certified mail, of the day, time, and place of hearing. The hearing shall commence within 30 days of the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties.

(c) If both complainant and the named person object to the findings and/or order, the objections shall be consolidated and a single hearing shall be conducted. If the objections are not received simultaneously, the hearing shall commence within 30 days of the receipt of the later objection.

(d) At the time the hearing order issues, the judge may order the prosecuting party to file a pre-hearing statement of position, which shall briefly set forth the issues involved in the proceeding and the remedy requested. Such pre-hearing statement shall be filed within three days of the receipt of the hearing order and shall be served on all parties by certified mail. Thereafter, within three days of receipt of the prosecuting party's pre-hearing statement, the other parties to the proceeding shall file pre-hearing statements of position.

§ 1978.107 Parties.

(a) In any case in which only the named person objects to the findings or the preliminary order the Assistant Secretary ordinarily shall be the prosecuting party. In such a case the complainant shall also be a party and may engage in discovery, present evidence or otherwise act as a party. The named person shall be the party-respondent. If, at any time after the named person files objections, the Assistant Secretary and complainant agree, the complainant may present the case to the judge. Under such circumstances the case will be handled as if it had arisen under paragraph (b) of this section.

(b) In any case in which only the complainant objects to findings that the complaint lacks merit, to the preliminary order, or to both, the complainant shall be the prosecuting party. The Assistant Secretary may as of right intervene as a party at any time in proceedings under this paragraph. The named person shall be the party-respondent.

(c) In any case in which both the complainant and the named person object to the preliminary order the Assistant Secretary shall be the prosecuting party. The complainant and the named person shall be the party-respondents. In any such case, if the named person also objected to the findings the Assistant Secretary, complainant, and named party shall each have the party status, rights, and responsibilities set forth in paragraph (a) of this section with respect to the findings.

§ 1978.108 Captions, titles of cases.

(a) Cases described in § 1978.107(a) shall be titled: Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party and (Name of Complainant), Complainant v. (Name of named person), Respondent.

(b) Cases described in § 1978.107(b) shall be titled: (Name of complainant), Complainant v. (Name of named person), Respondent.

(c) Cases described in § 1978.107(c) shall be titled: Assistant Secretary of Labor for Occupational Safety and Health, Prosecuting Party v. (Name of named person), Respondent. (Name of complainant), Complainant v. (Name of named person), Respondent.

(d) The titles listed in paragraphs (a), (b), and (c) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.

§ 1978.109 Decision and orders.**(a) Administrative Law Judge decisions.**

The administrative law judge shall issue a decision within 30 days after the close of the record. The close of the record shall occur no later than 30 days after the filing of the objection, except upon a showing of good cause or unless otherwise agreed to by the parties. For the purposes of the statute the issuance of the judge's decision shall be deemed the conclusion of the hearing. The decision shall contain appropriate findings, conclusions, and an order pertaining to the remedy which, among other things, may provide for reinstatement of a discharged employee and also may include an award of the complainant's costs and expenses (including attorney's fees) reasonably incurred in bringing and litigating the case, if the complainant's position has prevailed. The decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee. The decision shall be served upon all parties to the proceeding.

(b) The administrative law judge's decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision by the named person. All other portions of the judge's order are stayed pending review by the Secretary.

(c) Final order.

(1) Within 120 days after issuance of the administrative law judge's decision and order, the Administrative Review Board, United States Department of Labor, shall issue a final decision and order based on the record and the decision and order of the administrative law judge.

(2) The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, United States Department of Labor, upon notice to the parties, establishes a different briefing schedule.

(3) The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive.

(4) Where the Administrative Review Board, United States Department of Labor, determines that the named party has not violated the law, the final order shall deny the complaint.

(5) The final decision and order of the Administrative Review Board, United States Department of Labor, shall be served upon all parties to the proceeding.

§ 1978.110 Judicial review.

(a) Within 60 days after the issuance of a final order under § 1978.109, any person adversely affected or aggrieved by such 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 (49 U.S.C. 2305(d)(1)).

(b) A final order of the Administrative Review Board, United States

Department of Labor, shall not be subject to judicial review in any criminal or other civil proceedings (49 U.S.C. 2305(d)(2)).

(c) The record of a case, including the record of proceedings before the administrative law judge, shall be transmitted by the Administrative Review Board, United States Department of Labor, to the appropriate court pursuant to the rules of such court.

§ 1978.111 Withdrawal of section 405 complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, an employee may withdraw his or her section 405 complaint by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary shall thereafter determine whether the withdrawal shall be approved. The Assistant Secretary shall notify the named person of the approval of any withdrawal.

(b) The Assistant Secretary may withdraw his 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 shall begin a new 30-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his 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 Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

(d)(1) Investigative settlements. At anytime after the filing of a section 405 complaint by an employee and before the finding 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 settlement. 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 such settlement is approved by the Administrative Review Board, United States Department of Labor, or the ALJ. A copy of the settlement shall be filed with the ALJ or the Administrative Review Board, United States Department of Labor as the case may be.

(3) If, under paragraph (d)(1) or (2) of this section the named person makes an offer to settle the case which the Assistant Secretary, when acting as the prosecuting party, deems to be a fair and equitable settlement of all matters at issue and the complainant refuses to accept the offer, the Assistant Secretary may decline to assume the role of prosecuting party as set forth in § 1978.107(a). In such circumstances, the Assistant Secretary shall immediately notify the complainant that his review of the settlement offer may cause the Assistant Secretary to decline the role of prosecuting party. After the Assistant Secretary has reviewed the offer and when he or she has decided to decline the role of prosecuting party, the Assistant Secretary shall immediately notify all parties of his or her decision in

writing and, if the case is before the administrative law judge, or the Administrative Review Board, United States Department of Labor on review, a copy of the notice shall be sent to the appropriate official. Upon receipt of the Assistant Secretary's notice, the parties shall assume the roles set forth in § 1978.107(b).

Miscellaneous provisions

§ 1978.112 Arbitration or other proceedings.

(a) General.

(1) An employee who files a complaint under section 405 of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Secretary's jurisdiction to entertain section 405 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may proceed with the investigation and the issuance of findings and orders regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 405 complaints.

(3) Where complainant is in fact pursuing remedies other than those provided by section 405, the Secretary may, in his or her discretion, postpone a determination of the section 405 complaint and defer to the results of such proceedings.

(b) Postponement of determination. When a complaint is under investigation pursuant to § 1978.103, postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 405 and those proceedings are not likely to violate rights guaranteed by section 405. The factual issues in such proceedings must be substantially the same as those raised by a section 405 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(c) Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information. Before the Assistant Secretary or the Secretary defers to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 405 complaint.

§ 1978.113 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 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 occur.

§ 1978.114 Statutory time periods.

The time requirements imposed on the Secretary by these regulations are directory in nature. While every effort will be made to meet these requirements, there may be instances when it is not possible to meet these requirements. Failure to meet these requirements does not invalidate any action by the Assistant Secretary or Secretary under section 405.

§ 1978.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the judge or the Secretary on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue such orders as justice or the administration of section 405 requires.

**Public Transportation Employee Protections
National Transit Systems Security Act of 2007
6 U.S.C. § 1142
August 3, 2007**

(a) IN GENERAL.—A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security;

(3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

(4) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(5) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

(b) HAZARDOUS SAFETY OR SECURITY CONDITIONS.—

(1) A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) of this subsection exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if—

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

(3) In this subsection, only subsection (b)(1)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities.

(c) ENFORCEMENT ACTION.—

(1) FILING AND NOTIFICATION.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) or (b) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of a complaint filed under this paragraph, the Secretary of Labor shall notify, in writing, the person named in the complaint and the person's employer of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) INVESTIGATION; PRELIMINARY ORDER.—

(A) IN GENERAL.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary of Labor to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) or (b) of the Secretary of Labor's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) or (b) has occurred, the Secretary of Labor shall accompany the Secretary of Labor's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) REQUIREMENTS.—

(i) REQUIRED SHOWING BY COMPLAINANT.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in subsection (a) or (b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) SHOWING BY EMPLOYER.—Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under clause (i), no investigation otherwise required under paragraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) CRITERIA FOR DETERMINATION BY SECRETARY OF LABOR.—The Secretary of Labor may determine that a violation of subsection (a) or (b) has occurred only if the complainant demonstrates that any behavior described in subsection (a) or (b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) PROHIBITION.—Relief may not be ordered under paragraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) FINAL ORDER.—

(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS.—

Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) REMEDY.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) or (b) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation; and

(ii) provide the remedies described in subsection (d)

(C) ORDER.—If an order is issued under subparagraph (B), the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, bringing the complaint upon which the order was issued.

(D) FRIVOLOUS COMPLAINTS.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer reasonable attorney fees not exceeding \$1,000.

(4) REVIEW.—

(A) APPEAL TO COURT OF APPEALS.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) LIMITATION ON COLLATERAL ATTACK.—An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR.—Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) ENFORCEMENT OF ORDER BY PARTIES.—

(A) COMMENCEMENT OF ACTION.—A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) ATTORNEY FEES.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(7) DE NOVO REVIEW.—With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The action shall be governed by the same legal burdens of proof specified in paragraph (2)(B) for review by the Secretary of Labor.

(d) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (c) shall be entitled to all relief necessary to make the employee whole.

(2) DAMAGES.—Relief in an action under subsection (c) (including an action described in (c)(7)) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) POSSIBLE RELIEF.—Relief in any action under subsection (c) may include punitive damages in an amount not to exceed \$250,000.

(e) ELECTION OF REMEDIES.—An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency.

(f) NO PREEMPTION.—Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(g) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be construed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(h) DISCLOSURE OF IDENTITY.—

(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee who has provided information described in subsection (a)(1).

(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) of this subsection if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosure shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

(i) PROCESS FOR REPORTING SECURITY PROBLEMS TO THE DEPARTMENT OF HOMELAND SECURITY.—

(1) ESTABLISHMENT OF PROCESS.—The Secretary shall establish through regulations after an opportunity for notice and comment, and provide information to the public regarding, a process by which any

person may submit a report to the Secretary regarding public transportation security problems, deficiencies, or vulnerabilities.

(2) **ACKNOWLEDGMENT OF RECEIPT.**—If a report submitted under paragraph (1) identifies the person making the report, the Secretary shall respond promptly to such person and acknowledge receipt of the report.

(3) **STEPS TO ADDRESS PROBLEM.**—The Secretary shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

* * *

**Coast Guard
Rules and Regulations
Department of Transportation
33 CFR Part 53
Coast Guard Whistleblower Protection
Agency: Office of the Secretary, DOT.
Action: Final rule.
56 Federal Register 13404 (April 2, 1991)**

SUMMARY: This final rule implements the whistleblower protection provisions contained in Public Law 100-456. The rule applies to the United States Coast Guard, the Board for Correction of Military Records of the Coast Guard, and the Department of Transportation's Inspector General. It establishes procedures to ensure that members of the United States Coast Guard are protected from reprisals for making, or preparing to make, lawful communications to a Member of Congress or an Inspector General. In addition, the rule specifically requires the reporting and investigation of reprisal allegations, and provides for remedies when reprisal is found, including disciplinary action against any person taking reprisal and the correction of military records when appropriate.

DATES: Effective May 2, 1991.

SUPPLEMENTARY INFORMATION: Public Law 100-456 sets forth specific protections to be afforded to members of the Armed Forces who make lawful communications to a Member of Congress or to an Inspector General. Public Law 101-225, a technical correction, clarifies that, when the Coast Guard is not operating as a service in the Navy, Coast Guard members must submit complaints under this Act to the Inspector General of the Department of Transportation, and that the Secretary of Transportation may, if necessary, provide final review of the action.

Members of the Armed Forces who become aware of information evidencing wrongdoing or waste of funds generally have a duty to report such information through the chain of command. Public Law 100-456 establishes that those individuals also have the right to communicate directly with a Member of Congress or an Inspector General, unless the communication is unlawful under applicable law or regulation. When these individuals make lawful disclosures, the statute mandates that they

be protected from adverse personnel consequences, or the threat of such consequences. These individuals have the right to a prompt investigation and administrative review of claims of reprisals. If any claim of reprisal is found meritorious, the Secretary of Transportation is required to initiate appropriate corrective action, and the Board for Correction of Military Records should entertain any application for correction of records submitted by an aggrieved member. The Department published a notice of proposed rulemaking (NPRM) to implement these statutory changes on June 26, 1990 (55 FR 25983). The NPRM, which contains an extensive discussion of the statute and proposed regulatory language, provided a 60-day comment period, which closed on August 27, 1990. No comments were filed in response to the NPRM. The Department is therefore adopting the notice as proposed with minor clarifying changes that more closely track the statutory language.

List of Subjects in 33 CFR Part 53 Administrative practice and procedure, Fraud, Investigations, Military personnel, Whistleblowing. Accordingly, title 33 of the Code of Federal Regulations is amended to add part 53 as follows:

PART 53--COAST GUARD WHISTLEBLOWER PROTECTION

53.1 Purpose.

53.3 Applicability.

53.5 Definitions.

53.7 Requirements.

53.9 Responsibilities.

53.11 Procedures.

Authority: 10 U.S.C. 1034, Pub. L. 100-456, Pub. L. 101-225.

§ 53.1 Purpose.

This part: **(a)** Establishes policy and implements section 1034 of title 10 of the United States Code to provide protection against reprisal to members of the Coast Guard for making a lawful communication to a Member of Congress or an Inspector General.

(b) Assigns responsibilities and delegates authority for such protection and prescribes operating procedures.

§ 53.3 Applicability.

This part applies to members of the United States Coast Guard, the Board for Correction of Military Records of the Coast Guard, and the Department of Transportation's Office of the Inspector General.

§ 53.5 Definitions.

As used in this part, the following terms shall have the meaning stated, except as otherwise provided: Board for Correction of Military Records of the Coast Guard. The Department of Transportation Board for Correction of Military Records of the Coast Guard (Board) is empowered under 10 U.S.C. 1552 to make corrections of Coast Guard military records. The Board is part of the Office of the General Counsel in the Office of the Secretary of Transportation. Corrective Action. Any action deemed necessary to make the complainant whole, changes in agency regulations

or practices, and/or administrative or disciplinary action against offending personnel, or referral to the U.S. Attorney General or courtmartial convening authority of any evidence of criminal violation. Inspector General. The Inspector General in the Office of Inspector General of the Department of Transportation, as appointed under the Inspector General Act of 1978. Law Specialist. A commissioned officer of the Coast Guard designated for special duty (law). Member of the Coast Guard. Any past or present Coast Guard uniformed personnel, officer or enlisted, regular or reserve. This definition includes cadets of the Coast Guard Academy.

Member of Congress. In addition to a Representative or a Senator, the term includes any Delegate or Resident Commissioner to Congress. Personnel Action. Any action taken regarding a member of the Coast Guard that adversely affects or has the potential to adversely affect the member's position or his or her career. Such actions include, but are not limited to, a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; or a decision concerning a promotion, pay, benefits, awards, or training. Reprisal. Taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action against a member of the Coast Guard for making or preparing to make a communication to a Member of Congress or an Inspector General. Secretary. The Secretary of Transportation or his or her delegate.

§ 53.7 Requirements.

(a) No person within the Department of Transportation may restrict a member of the Coast Guard from lawfully communicating with a Member of Congress or an Inspector General.

(b) Members of the Coast Guard shall be free from reprisal for making or preparing to make lawful communications to Members of Congress or an Inspector General.

(c) Any employee or member of the Coast Guard who has the authority to take, direct others to take, or recommend or approve any personnel action shall not, under such authority, take, withhold, threaten to take, or threaten to withhold a personnel action regarding any member of the Coast Guard in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General.

§ 53.9 Responsibilities.

(a) The Inspector General, Department of Transportation shall:

(1) Expeditiously investigate any allegation, if such allegation is submitted, that a personnel action has been taken (or threatened) in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General concerning a complaint or disclosure of information that the member reasonably believes constitutes evidence of a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. No investigation is required when such

allegation is submitted more than 60 days after the Coast Guard member became aware of the personnel action that is the subject of the allegation.

(2) Initiate a separate investigation of the information the Coast Guard member believes evidences wrongdoing if such investigation has not already been initiated. The Inspector General is not required to make such an investigation if the information that the Coast Guard member believes evidences wrongdoing relates to actions that took place during combat.

(3) Complete the investigation of the allegation of reprisal and issue a report not later than 90 days after receipt of the allegation, which shall include a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted. The Inspector General may forward a recommendation as to the disposition of the complaint.

(4) Submit a copy of the investigation report to the Secretary of Transportation and to the Coast Guard member making the allegation not later than 30 days after the completion of the investigation. The copy of the report issued to the Coast Guard member may exclude any information not otherwise available to the Coast Guard member under the Freedom of Information Act (5 U.S.C. 552).

(5) If a determination is made that the report cannot be issued within 90 days of receipt of the allegation, notify the Secretary and the Coast Guard member making the allegation of the reasons why the report will not be submitted within that time, and state when the report will be submitted.

(6) At the request of the Board, submit a copy of the investigative report to the Board.

(7) After the final action with respect to an allegation filed under this part, whenever possible, interview the person who made the allegation to determine *13406 the views of that person concerning the disposition of the matter.

(b) The Board shall, in accordance with its regulations (33 CFR part 52):

(1) Consider under 10 U.S.C. 1552 and 33 CFR part 52 an application for the correction of records made by a Coast Guard member who has filed a timely complaint with the Inspector General, alleging that a personnel action was taken in reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General. This may include oral argument, examining and cross-examining witnesses, taking depositions, and conducting an evidentiary hearing at the Board's discretion.

(2) Review the report of any investigation by the Inspector General into the Coast Guard member's allegation of reprisal.

(3) As deemed necessary, request the Inspector General to gather further

evidence and issue a further report to the Board.

(4) Issue a final decision concerning the application for the correction of military records under this part not later than 180 days after receipt of a complete application.

(c) If the Board elects to hold an administrative hearing, the Coast Guard member may be represented by a Coast Guard law specialist if:

(1) The Inspector General, in the report of the investigation, finds there is probable cause to believe that a personnel action was taken, withheld, or threatened in reprisal for the Coast Guard member making or preparing to make a lawful communication to a Member of Congress or an Inspector General;

(2) The Chief Counsel of the Coast Guard determines that the case is unusually complex or otherwise requires the assistance of a law specialist to ensure proper presentation of the legal issues in the case; and

(3) The Coast Guard member is not represented by outside counsel chosen by the member.

(d) If the Board elects to hold an administrative hearing, the Board must ensure that the Coast Guard member may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence in the Inspector General investigatory record but not included in the report released to the member.

(e) If the Board determines that a personnel action was taken in reprisal for a Coast Guard member making or preparing to make a lawful communication to a Member of Congress or an Inspector General, the Board may forward its recommendation to the Secretary for the institution of appropriate administrative or disciplinary action against the individual or individuals found to have taken reprisal, and direct any appropriate correction of the member's records.

(f) The Board shall notify the Inspector General of the Board's decision concerning an application for the correction of military records of a Coast Guard member who alleged reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, and of any recommendation to the Secretary for appropriate administrative or disciplinary action against the individual or individuals found to have taken reprisal.

(g) When reprisal is found, the Secretary shall ensure that appropriate corrective action is taken.

§ 53.11 Procedures.

(a) Any member of the Coast Guard, who reasonably believes a personnel action (including the withholding of an action) was taken or threatened in

reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, may file a complaint with the DOT Inspector General Hotline under this part. Such a complaint may be filed by telephone, or by letter addressed to the Department of Transportation, Office of Inspector General, Hotline Center, P.O. Box 23178, Washington, D.C. 20026-0178. Telephone Numbers: 1-800-424-9071, FTS 8-366-1461. The commercial number is (202) 366-1461.

(b) The complaint should include the name, address, and telephone number of the complainant; the name and location of the activity where the alleged violation occurred; the personnel action taken, or threatened, that is alleged to be motivated by reprisal; the individual(s) believed to be responsible for the personnel action; the date when the alleged reprisal occurred; and any information that suggests or evidences a connection between the communication and reprisal. The complaint should also include a description of the communication to a Member of Congress or an Inspector General including a copy of any written communication and a brief summary of any oral communication showing date of communication, subject matter, and the name of the person or official to whom the communication was made.

(c) A member of the Coast Guard who is alleging reprisal for making or preparing to make a lawful communication to a Member of Congress or an Inspector General, may submit an application for the correction of military records to the Board, in accordance with regulations governing the Board. See 33 CFR part 52.

(d) An application submitted under paragraph (c) of this section shall be considered in accordance with regulations governing the Board. See 33 CFR part 52.

Issued in Washington, DC, on March 26, 1991.

Samuel K. Skinner,
Secretary

Memorandum of Understanding Between the Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA)

67 Federal Register 55883 (August 30, 2002)

AGENCIES: Occupational Safety and Health Administration, Department of Labor and Federal Aviation Administration, Department of Transportation.

SUMMARY: The Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA) entered into a Memorandum of Understanding (MOU), effective March 22, 2002. The purpose of the MOU is to facilitate coordination and cooperation concerning the employee protection provisions of the Aviation

Whistleblower Protection Program, 49 U.S.C. 42121. Both agencies agree that administrative efficiency and sound enforcement policies will be maximized by this cooperation and the timely exchange of information in areas of mutual interest. The text of the MOU is set forth below. Authority: 49 U.S.C. 42121; Secretary of Labor's Order No. 3-2000, 65 FR 50017 (August 16, 2000).

Signed at Washington, DC, this 15 day of August, 2002.
For the Occupational Safety and Health Administration.
John L. Henshaw,

Assistant Secretary, Occupational Safety and Health Administration.
Memorandum of Understanding Between The Federal Aviation Administration, U.S. Department of Transportation and The Occupational Safety and Health Administration, U.S. Department of Labor

I. Purpose

The purpose of this Memorandum of Understanding (MOU) is to facilitate coordination and cooperation concerning the protection of employees who provide air safety information under the provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121.

II. Background

The Aviation Whistleblower Protection Program, 49 U.S.C. 42121, prohibits air carriers, air carrier contractors, and air carrier subcontractors from discharging an employee or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

- (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
- (2) has 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 FAA or any other provision of Federal law relating to air carrier safety under this subtitle or 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. FAA and the Secretary of Labor, through the Occupational Safety and Health Administration (OSHA), both have responsibilities related to 49 U.S.C. 42121. FAA has responsibility to investigate complaints related to air carrier safety and has authority under the FAA's statute to enforce air safety regulations and issue sanctions to airmen and air carriers for noncompliance with these regulations. FAA enforcement

action may include air carrier and/or airman certificate suspension and/or revocation and/or the imposition of civil penalties. Additionally, FAA may issue civil penalties for violations of 49 U.S.C. 42121. OSHA has the responsibility to investigate employee complaints of discrimination and may order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. Although FAA and OSHA will carry out their statutory responsibilities independently, the agencies agree that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

III. Process for Coordination

This MOU sets forth a process that FAA and OSHA agree to follow. FAA and OSHA will establish a procedure for coordinating and supporting enforcement of 49 U.S.C. 42121. OSHA agrees to promptly notify the FAA national headquarters Whistleblower Protection Program point of contact of any discrimination complaints *55884 filed with the Department of Labor (DOL) under 49 U.S.C. 42121. OSHA will promptly provide FAA with a copy of the complaint, findings and preliminary orders, investigation reports, and orders associated with any hearing or administrative appeal related to the complaint. OSHA will also keep FAA currently informed of the status of any administrative or judicial proceeding seeking review of an order of DOL issued under 49 U.S.C. 42121.

When an individual directly notifies FAA of alleged discrimination that involves air carrier safety, FAA will investigate the safety complaint and will provide OSHA with a copy of the individual's allegations. FAA will inform the individual that a personal remedy for discrimination is available only through DOL and that the individual should personally contact DOL. FAA will provide the individual with the local address and telephone number of the nearest OSHA office and advise the individual that the law requires that complaints be filed with OSHA within ninety (90) days of the alleged discrimination. FAA and OSHA agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving an employee of air carrier or air carrier contractor or subcontractor of an air carrier. Each agency agrees to share all information it obtains relating to each complaint of discrimination and will adopt mutually agreeable procedures for the protection of information that either agency deems confidential. Each agency shall designate and maintain points of contact within its national headquarters and regional offices for purposes of implementation of this MOU and continued program oversight. A national headquarters Aviation Whistleblower Protection Program point of contact will be established and identified by each agency within ten (10) days after the effective date of this agreement. Regional office points of contact for each agency will be identified within six (6) months after the effective date of this agreement. Matters affecting program procedures and policy issues will be handled by the respective national headquarters office of each agency.

IV. Implementation

The FAA official responsible for implementation of this Agreement is the FAA Administrator; the DOL official responsible for implementation of this Agreement is the OSHA Assistant Secretary.

V. Amendment and Termination

This Agreement may be amended or modified upon written agreement by both parties to the Agreement. The Agreement may be terminated upon ninety (90) days written notice by either party.

VI. Legal Effect

Nothing in this MOU is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions, including the OSHA authority under the Occupational Safety and Health Act, 29 U.S.C. 651 et seq., nor is it intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any other person. This MOU is effective upon signature by both parties.

Dated: March 11, 2002.

Jane F. Garvey,
Administrator, Federal Aviation Administration, U.S. Department of
Transportation.

Dated: March 22, 2002.

John L. Henshaw,
Assistant Secretary, Occupational Safety and Health, U.S. Department of
Labor.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR 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

ACTION: Final Rule

68 Federal Register 14099 (March 21, 2003)

Subpart A - Complaints, Investigations, Findings and Preliminary Orders

1979.100 Purpose and scope.

1979.101 Definitions.

1979.102 Obligations and prohibited acts.

1979.103 Filing of discrimination complaint.

1979.104 Investigation.

1979.105 Issuance of findings and preliminary orders.

Subpart B - Litigation

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

1979.107 Hearings.

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 5-2002, 67 FR 65008 (October 22, 2002).

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 discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified 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. * *FR Page14108*

(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, 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 violations.

(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 OSHA 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). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.

§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 (redacted 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 and paragraph (e) of §1979.110. 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 or suspected, 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 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 a contributing factor in the unfavorable 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 20 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 20 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, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with 29 CFR Part 70.

(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 redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted 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 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person * *FR Page14109* can agree, if the interests of justice so require.