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Part VI

Department of Labor

Office of the Secretary

29 CFR Part 24

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

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 24

RIN 1215–AA83

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

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of proposed rulemaking, request for comments.

SUMMARY: The Department of Labor (Department or DOL) proposes to amend the regulations governing the employee "whistleblower" protection provisions of Section 211 (formerly Section 210) of the Energy Reorganization Act of 1974, as amended, to implement the statutory changes enacted into law on October 24, 1992, as part of the Energy Policy Act of 1992. The Department proposes to establish separate procedures and time frames for the handling of ERA complaints under 29 CFR part 24 to implement the statutory amendments. In addition, a revised procedure for review by the Secretary of Labor of recommended decisions of administrative law judges is proposed.

DATES: Comments are due on or before May 16, 1994.

ADDRESSES: Submit written comments to Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. As a convenience to commenters, comments may be transmitted by facsimile ("FAX") machine to (202) 219–5122. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S–3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 219–8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act.

II. Background

The Department of Labor, through the Employment Standards Administration's Wage and Hour Division (WHD), is responsible under 29 CFR part 24 for investigating complaints under several Federal laws enacted to protect the environment containing employee whistleblower provisions that prohibit discriminatory action by employers when employees report unsafe or unlawful practices of their employers that adversely affect the environment. These whistleblower protections prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment because the employee engages in any of the activities specified in the particular statute as a protected activity. WHD administers seven employee whistleblower protection statutes under 29 CFR part 24, as follows: (1) Safe Drinking Water Act, 42 U.S.C. 300j–9(i); (2) Water Pollution Control Act, 33 U.S.C. 1367; (3) Toxic Substances Control Act, 15 U.S.C. 2622; (4) Solid Waste Disposal Act, 42 U.S.C. 6971; (5) Clean Air Act, 42 U.S.C. 7622; (6) Energy Reorganization Act of 1974, 42 U.S.C. 5851; and (7) Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.

The Energy Policy Act of 1992, Public Law 102–486, was enacted on October 24, 1992. Among other provisions, this new law significantly amended the employee protection provisions for nuclear whistleblowers under former § 210 (now § 211) of the ERA; the amendments affect only ERA whistleblower complaints and do not extend to the procedures established in 29 CFR part 24 for handling employee whistlblower complaints under the Federal statutory employee protection provisions other than the ERA. The legislative amendments to ERA apply to whistleblower claims filed under § 211(b)(1) of the ERA as amended (42 U.S.C. 5851(b)(1)) on or after October 24, 1992, the date of enactment of § 2902 of the Energy Policy Act of 1992 (§ 2902, Pub. L. 102–486; 106 Stat. 2776).

Before the Energy Policy Act of 1992 was enacted, DOL did not have jurisdiction under former § 210 of the ERA over reprisal complaints by employees of Department of Energy (DOE) contractors or their subcontractors. See *Adams* v. *Dole*, 927 F.2d 771 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 122. The DOE, however, established administrative procedures for handling complaints of reprisal by such employees not covered by DOL's procedures (see 10 CFR part 708). As a result of the statutory amendments to the ERA made by the Energy Policy Act of 1992, contractors and subcontractors of DOE, except those involved in naval nuclear propulsion work, are now expressly included within the statutory definition of a covered "employer" and are, therefore, subject to DOL jurisdiction for complaints filed by their employees of employer-reprisal for engaging in protected activities under the ERA.

III. Summary of Statutory Changes to ERA Whistleblower Provisions

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

Prohibited Acts. Former Section 210 of the ERA protected an employee against discrimination from an employer because the employee: (1) Commenced, caused to be commenced, or was about to commence or cause to be commenced a proceeding under the ERA or the Atomic Energy Act of 1954 (AEA); (2) testified or was about to testify in any such proceeding; or (3) assisted or participated or was about to assist or participate in any manner in such a proceeding "* * * or in any other action to carry out the purposes of (the ERA or the AEA)." The Department's interpretation, under ERA as well as the other environmental whistleblower laws which DOL administers, is that employees who file complaints internally with an employer are protected from employer reprisals. An employee is protected under 29 CFR 24.2(b)(3) if an employee assists or participates in "* * * any other action to carry out the purposes of such Federal (environmental protection) statute," which would encompass such internal complaints. This conclusion, that whistleblower protections extend to internal safety and quality control complaints, has been sustained by a number of courts of appeals. See, e.g., *Mackowiak* v. *University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Passaic Valley Sewerage Commissioner* v. *Department of Labor*, 992 F.2d 474 (3rd Cir. 1993), *cert. denied*, 62 U.S. L.W. 3334 (1993). *Contra, Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984). Under the Energy Policy Act of 1992, ERA's statutory definition of protected whistleblower activity was

expanded to expressly include employees who file internal complaints with employers, employees who oppose any unlawful practice under the ERA or the AEA, and employees who testify before Congress or in any other Federal or State proceeding regarding the ERA or AEA—thereby overriding the decision of the Fifth Circuit in *Brown & Root*.

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

Time Period for Filing Complaints. The time period for filing ERA whistleblower complaints has been expanded from 30 days to 180 days from the date the violation occurs. Investigations of complaints, however, will still be conducted under the statute within 30 days of receipt of the complaint. The ERA amendments apply to all complaints filed on or after the date of enactment. Thus, complaints previously filed that were deemed untimely and were therefore dismissed before the 1992 statutory amendments were enacted may be considered timely under the amended law if the complaint was refiled after October 24, 1992, and within the new 180-day time frame.

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

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

Under the former lines of analysis for the ERA and continuing for whistleblower complaints under the other six environmental statutes, once a complainant employee presents evidence sufficient to raise an inference that protected conduct likely was a "motivating" factor in an adverse action taken by an employer against the employee, it is necessary for the employer to present evidence that the alleged adverse treatment was motivated by legitimate, nondiscriminatory reasons. If the employer presents such evidence, the employee still may succeed by showing that the proffered reason was not the true reason for the employment decision; the employee may succeed in this regard by showing that a discriminatory reason more likely motivated the employer, or by showing that the employer's proffered explanation is not believable ("pretext" cases). In certain cases, the trier of fact may conclude that the employer was motivated by both prohibited and legitimate reasons ("dual motive" cases). In such dual motive cases, the employer may prevail by showing by a *preponderance of the evidence* that it would have reached the same decision *even in the absence of the protected conduct*. In pretext cases, rejection of the employer's proffered reasons, together with the elements of the *prima facie* case, may be sufficient to show discrimination. See *Dartey* v. *Zack*, *supra*, pp. 6–9.

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

Under the ERA as amended, a complainant must make a "*prima facie*" showing that protected conduct or activity was "a contributing factor" in the unfavorable personnel action alleged in the complaint, i.e., that the whistleblowing activity, alone or in combination with other factors, affected in some way the outcome of the employer's personnel decision (Section 211(b)(3)(A)). If the complainant does not make the *prima facie* showing, the complaint must be dismissed and the investigation discontinued.

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

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

Thus, under the amendments to ERA, the Secretary must dismiss the complaint and not investigate (or cease investigating) if either: (1) The complainant fails to meet the *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected conduct.

These new burdens of proof limitations also apply to the determination as to whether an employer has violated the Act and relief should be ordered. Thus, a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint (Section 211(b)(3)(C)). Even if the complainant makes this showing, relief may not be ordered if the employer satisfies the statutory requirement to demonstrate by "clear and convincing evidence" that it would have taken the same personnel action in the absence of the protected activity (Section 211(b)(3)(D)).

Other Changes. The ERA whistleblower provisions must be prominently posted in any place of employment to which the Act applies. The amendments also include an

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

IV. Summary of Proposed Rule

Section 24.1(a), which lists the Federal statutes providing employee protections for whistleblowing activities for which the Department of Labor is responsible for enforcement under this part, is updated to add the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.

Section 24.2, describing obligations and prohibited acts, is revised to reflect the statutory amendments to the protected activities covered under the ERA, and to state that the Secretary interprets all of the whistleblower statutes to apply to such internal whistleblowing activities. The requirements for posting of notices of the employee protection provisions of the ERA are also added, together with a provision that failure to post the required notice shall make the requirement that a complaint be filed with the Administrator within 180 days inoperative, unless the respondent is able to establish that the employee had actual notice of the provisions. This explicit recognition that the statute of limitations may be equitably tolled is based on case law under analogous statutes. See, for example, *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981), and *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), arising under the Age Discrimination in Employment Act, and *Kamens* v. *Summit Stainless, Inc.*, 586 F. Supp. 324 (E.D. Pa. 1984), arising under the Fair Labor Standards Act.

Section 24.3, concerning complaints, is revised to reflect the 180-day filing period for complaints under the ERA.

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

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

Section 24.6 (formerly § 24.5) makes it clear that the Wage-Hour Administrator may participate in proceedings as a party or as *amicus curiae*. In addition, at the request of the Nuclear Regulatory Commission, a provision has been added to expressly permit Federal agencies to participate as *amicus curiae*, and to receive copies of pleadings on request.

Section 24.7 (formerly § 24.6), concerning recommended decisions and orders, is revised to add the statutory requirement that interim relief be ordered in ERA cases once an administrative law judge issues a recommended decision that the complaint is meritorious. Section 24.7 is also amended with respect to all whistleblower cases to provide that the recommended decision of the administrative law judge becomes the final order of the Secretary if no petition for review is filed.

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

Former § 24.7, concerning judicial review, and former § 24.8, concerning enforcement of decisions of the Secretary, have been removed. These provisions vary from statute to statute among the whistleblower programs. Furthermore, the types of judicial review or enforcement actions which are available does not need to be the subject of rulemaking since it is prescribed by statute and concerns judicial remedies.

Executive Order 12866

The Department believes that this proposed rule is not a "significant regulatory action" within the meaning of Executive Order 12866, in that it is not likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Analysis

The Department has determined that the proposed regulation will not have a significant economic impact on a substantial number of small entities. The proposal implements regulatory revisions necessitated by statutory amendments enacted by the Congress which are largely procedural in nature, or which narrowly extend the scope of the law to include employees of contractors or subcontractors of the Department of Energy (except those involved in naval nuclear propulsion work under E.O. 12344), licensees of an agreement State under the Atomic Energy Act, applicants for such licenses, and their contractors and subcontractors. The Department of Labor has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Therefore, no regulatory flexibility analysis is required.

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 24

Employment, Environmental protection.

Accordingly, for the reasons set out in the preamble, 29 CFR part 24 is proposed to be amended as set forth below.

Signed at Washington, DC, on March 10, 1994.

Maria Echaveste,

Administrator, Wage and Hour Division.

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

1. and 2. The authority citation for part 24 is proposed to be revised to read as follows:

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

3. Section 24.1 is proposed to be amended by revising paragraph (a) to read as follows:

§ 24.1 Purpose and scope.

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

* * * * *

4. Section 24.2 is proposed to be amended by revising paragraph (a) and paragraph (b) introductory text, and by adding paragraphs (c) and (d) to read as follows:

§ 24.2 Obligations and prohibited acts.

(a) No employer subject to the provisions of the Federal statute of which these protective provisions are a part, or to the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et. seq.*, may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.

(b) Any employer is deemed to have violated the particular Federal law, including the Atomic Energy Act of 1954, and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has:

* * * * *

(c) Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in § 24.1 of this part, any employer is deemed to have violated the particular Federal law, including the Atomic Energy Act of 1954, and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has:

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

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

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

(d) (1) Every employer subject to the Energy Reorganization Act of 1974, as amended, shall prominently post and keep posted in any place of employment to which the employee protection provisions of the Act applies a notice prepared or approved by the Department of Labor that explains the employee protection provisions of the Act and the regulations in this part. Copies of such notice may be obtained from the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210.

(2) Where the notice required by paragraph (d)(1) of this section has not been posted, the requirement in § 24.3(b)(2) that a complaint be filed with the Administrator within 180 days of an alleged violation shall be inoperative unless the respondent establishes that the complainant had notice of that requirement. If it is established that the notice was posted after the alleged discriminatory action occurred or that the complainant later obtained actual notice, the 180 days shall run from that date.

5. Section 24.3 is proposed to be amended by revising paragraphs (b) and (d) to read as follows:

§ 24.3 Complaint.

* * * * *

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

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

* * * * *

(d) *Place of filing.* A complaint may be filed in person or by mail at the nearest local office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration, Wage-Hour Division. A complaint may also be filed with the Office of the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210.

6. Section 24.4 is proposed to be amended by revising paragraph (d)(2) and (d)(3) and by adding a new paragraph (d)(4) to read as follows:

§ 24.4 Investigations.

* * * * *

(d) (1) * * *

(2) If on the basis of the investigation the Administrator determines that the complaint is without merit, the notice of determination shall include or be accompanied by notice to the complainant that the notice of determination shall become the final order of the Secretary denying the complaint unless within five business days of its receipt the Chief Administrative Law Judge receives from the complainant a request for a hearing filed by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of any request for a hearing shall be sent by the complainant to the respondent (employer) on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service.

(3) If on the basis of the investigation the Administrator determines that a violation has occurred, the notice of the determination shall include an appropriate order to abate the violation, and notice to the respondent and complainant that the order shall become the final order of the Secretary unless within five business days of its receipt the Chief Administrative Law Judge receives from the respondent or from complainant (where the determination or order is partially adverse) a request for a hearing filed by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of any request for a hearing shall be sent to the complainant or respondent, as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service.

(4) Copies of any requests for a hearing shall be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, on the same day that the hearing is requested by facsimile (fax), telegram,

hand delivery, or next-day delivery service.

7. Section 24.7 is proposed to be removed, § 24.6 is proposed to be redesignated as § 24.7; and § 24.5 is proposed to be redesignated as § 24.6 and amended by adding new paragraphs (f) and (g) as follows:

§ 24.6 Hearings.

* * * * *

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

(2) Copies of pleadings in all cases, whether or not the Administrator is participating in the proceeding, shall be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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

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

8. A new § 24.5 is proposed to be added to read as follows:

§ 24.5 Investigations under the Energy Reorganization Act.

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

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

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

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

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

(iii) The employee has suffered an unfavorable personnel action under circumstances sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required elements of a *prima facie* case, *i.e.*, to give rise to an inference that the respondent knew that the employee engaged in protected activity, and that the protected activity was likely a reason for the personnel action. Normally the burden is satisfied, for example, if it is shown that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If these elements are not substantiated in the investigation, the investigation will cease.

(c) (1) Notwithstanding a finding that a complainant has made a *prima facie* showing required by this section with respect to complaints filed under the Energy Reorganization Act, an investigation of the complainant's complaint under that Act shall be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.

(2) Upon receipt of a complaint under the Energy Reorganization Act, the respondent shall be advised that any evidence it may wish to submit to rebut the allegations in the complaint must be received within five (5) business days from receipt of notification of the complainant. If the respondent fails to make a timely response or if the response does not demonstrate by clear and convincing evidence that the unfavorable action would have occurred absent the protected conduct, the investigation shall proceed. The investigation shall proceed whenever it is necessary or appropriate to confirm or verify the information provided by respondent.

(d) (1) Whenever the Administrator dismisses a complaint pursuant to this section without completion of an investigation, the Administrator shall give notice of the dismissal, which shall contain a statement of reasons therefor, by certified mail to the complainant, the respondent, and their representatives. At the same time the Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and a copy of the notice of dismissal. The notice of dismissal shall include notice that the dismissal shall become the final order of the Secretary denying the complaint unless within five business days of its receipt the complainant files with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service, a request for a hearing on the complaint.

(2) Copies of any request for a hearing shall be sent by the complainant to the respondent and to the Administrator, Wage and Hour Division, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, on the same day that the hearing is requested, the facsimile (fax), telegram, hand delivery, or next-day delivery service.

9. Newly designated § 24.7 is proposed to be revised to read as follows:

§ 24.7 Recommended decision and order.

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

(b) In cases under the Energy Reorganization Act, a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The proceeding before the administrative law judge shall be a proceeding on the merits of the complaint. Neither the Administrator's determination to dismiss a complaint pursuant to § 24.5 of this part without completing an investigation nor the Administrator's determination not to dismiss a complaint is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation on the basis that such a determination to dismiss was made in error.

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

(2) In cases brought under the Energy Reorganization Act, when an administrative law judge issues a recommended order that the complaint has merit, the judge shall also issue a preliminary order providing the relief specified in § 24.7(c)(1) of this part with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately, whether or not a petition for review is filed with the Secretary. Any award of compensatory damages shall not be effective until the completion of any review by the Secretary.

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

10. and 11. Section 24.8 is proposed to be revised to read as follows:

§ 24.8 Review by the Secretary.

(a) Any party desiring review of a recommended decision of the administrative law judge shall file a petition for review with the Secretary. To be effective, such a petition for review must be received within ten business days of the date of the decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge.

(b) Copies of the petition and all briefs shall be served on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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

(d) (1) If the Secretary concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and, when appropriate, compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate.

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

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

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