

II. The "Reasonable Cause" Standard Supports a Merit Determination If a Reasonable Judge

Because OSHA makes its reasonable cause determination prior to a hearing, the reasonable cause is the evidence standard that applies following a hearing.⁵ The threshold OSHA must meet to find reasonable cause is that there is evidence in support of each element of a violation and consideration of the evidence provided by the complainant generally require as much evidence as would be required at trial.⁶ Thus, after evaluating all of the evidence, OSHA must believe that a reasonable judge could rule in favor of the complainant. Accordingly, OSHA must believe after consideration of the relevant law and facts – that a reasonable judge could believe a violation occurred conclusively that a violation *did* occur.

OSHA's responsibility to determine whether there is reasonable cause to believe a violation occurred is to demonstrate a prima facie allegation that is enough to trigger the investigation.⁷ However, a reasonable cause determination requires as much evidence as would be required at trial to establish unlawful retaliation by a preponderance of the evidence. OSHA's credibility determinations to evaluate whether a reasonable judge could find in the complainant's favor must take into account possible conflicts in the evidence or make conclusive credibility determinations to find reasonable cause. OSHA believes, after considering all of the evidence gathered during the investigation, that the complainant's claim is appropriate to issue a merit finding under the statutes that provide for litigation before an ALJ ("administrative review of final order" or "ARFO" in cases under the statutes that provide for district court litigation ("district court statutes").

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

OSHA's merit and non-merit findings under the administrative statutes should reference the reasonable cause evidence standard that would apply to the claim at trial.⁹ OSHA's dismissal findings under the district court statutes should state whether OSHA determined that the complaint lacks merit or is not suitable for litigation and explain why.

¹ Chapters 3.V and 3.VI of OSHA's Whistleblower Investigations Manual are ambiguous in this regard when it next revises that chapter.

²See The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 1514A; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Federal Railroad Safety Systems Security Act (NTSSA), 6 U.S.C. § 1142; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 218C; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Act of 2010, 12 U.S.C. § 5567; FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; and Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171. OSHA's regulations under these whistleblower statutes incorporate the same language.

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

⁴See Clean Air Act (CAA), 42 U.S.C. § 7622, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. § 6971; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622.

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

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

⁷ Under most of the whistleblower statutes, the complaint, supplemented as appropriate by interview of facts and evidence sufficient to make a prima facie showing before OSHA will conduct an investigation. For example, under AIR21, "[t]he Secretary of Labor shall dismiss a complaint filed under this subsection if the complainant fails to meet the requirements required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint."

⁸See *Roadway Express, Inc.*, 481 U.S. at 266 (1987) (plurality opinion) (noting that an OSHA investigator should interview witnesses or confront all conflicting evidence, because the investigator does not have the benefit of a trial.

⁹ The sample findings in the Whistleblower Investigations Manual correctly reference the reasonable

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