Policy Documents / Clarification of the Investigative Standard for OSHA Whistleblower Investigation

April 20, 2015

**MEMORANDUM FOR:** REGIONAL ADMINISTRATORS

WHISTLEBLOWER PROGRAM MANAGERS

**THROUGH:** DOROTHY DOUGHERTY

**Deputy Assistant Secretary** 

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**FROM:** ERIC S. HARBIN, ACTING DIRECTOR

Directorate of Whistleblower Protection Programs

**SUBJECT:** Clarification of the Investigative Standard for OSHA Whistleblower Ir

Under the whistleblower statutes administered by the Occupational Safety and Health Administratic complaint alleging unlawful retaliation. If OSHA's initial inquiry shows that the complainant has alleg make a prima facie showing of retaliation, OSHA then conducts an investigation to determine wheth Whistleblower Protection Programs (DWPP) is issuing this memorandum to clarify the investigative

## I. The Standard that Applies to OSHA Whistleblower Investigations is Whether OSHA Has Re

Many of the statutes that OSHA administers state that the Secretary "shall conduct an investigation believe that the complaint has merit." The Surface Transportation Assistance Act (STAA) and Sear provision, but describe the investigative standard as "whether it is reasonable to believe the comple (ERA) and the six environmental whistleblower statutes do not provide an investigative standard, C standard applies for determining whether to issue written merit findings. 29 C.F.R. § 24.105(a)(1). The Administrative Law Judge (ALJ) following OSHA's investigation, OSHA issues merit findings when the relevant whistleblower statute has occurred.

Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), the Asbestos Hazard Emergency Response Act (A Container Act (ISCA), 46 U.S.C. § 80507, do not explicitly state an investigative standard but rather a violation, the Secretary may bring an action in district court. Under those statutes, when OSHA be that a violation occurred, OSHA should consult informally with the Regional Solicitor's Office ("RSC investigation captures as much relevant information as possible so that the RSOL can evaluate when the preponderance of the evidence standard that the court will apply. In cases that the RSOL litigat RSOL may be necessary to determine whether a case is suitable for litigation. The ultimate respons litigation rests with the RSOL.

II. The IIDecemble Occesii Chandend Ormanide e Menit Determination if a Decemble Irida

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

OSHA's responsibility to determine whether there is reasonable cause to believe a violation occurre demonstrate a prima facie allegation that is enough to trigger the investigation.<sup>7</sup> However, a reason evidence as would be required at trial to establish unlawful retaliation by a preponderance of the ev credibility determinations to evaluate whether a reasonable judge could find in the complainant's fa possible conflicts in the evidence or make conclusive credibility determinations to find reasonable consultations of the evidence gathered during the investigation, that the corresponding to issue a merit finding under the statutes that provide for litigation before an ALJ ("adn RSOL 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 reason evidence standard that would apply to the claim at trial. OSHA's dismissal findings under the distr determined that the complaint lacks merit or is not suitable for litigation and explain why.

<sup>&</sup>lt;sup>1</sup> Chapters 3.V and 3.VI of OSHA's Whistleblower Investigations Manual are ambiguous in this regawhen it next revises that chapter.

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

<sup>&</sup>lt;sup>3</sup> 49 U.S.C. § 31105(b)(2)(A); 46 U.S.C. § 2114(b).

<sup>&</sup>lt;sup>4</sup>See ERA, 42 U.S.C. § 5851, Clean Air Act (CAA), 42 U.S.C. § 7622, Comprehensive Environmental 42 U.S.C. § 9610; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; Safe Drinking W Disposal Act (SWDA), 42 U.S.C. § 6971; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622.

<sup>5</sup>See 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 foll

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

<sup>7</sup> Under most of the whistleblower statutes, the complaint, supplemented as appropriate by intervie of facts and evidence sufficient to make a prima facie showing before OSHA will conduct an investi example, under AIR21, "[t]he Secretary of Labor shall dismiss a complaint filed under this subsection required under subparagraph (A) unless the complainant makes a prima facie showing that any beh subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complain

<sup>8</sup>See Roadway Express, Inc., 481 U.S. at 266 (1987) (plurality opinion) (noting that an OSHA investig of witnesses or confront all conflicting evidence, because the investigator does not have the benefit

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<sup>&</sup>lt;sup>9</sup> The sample findings in the Whistleblower Investigations Manual correctly reference the reasonable