

## CHAPTER X

### DISCRIMINATION COMPLAINTS

#### A. General.

##### 1. Statutory Background.

- a. Section 50-9-25(a) NMSA 1978 provides that "no person shall discharge or in any manner discriminate against any employee because said employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the . . . Act or has testified or is about to testify in any such proceedings or because of the exercise by said employee on behalf of himself or others of any right afforded by the . . . Act."
- b. The Act, in Section 50-9-25B, provides a procedural mechanism to employees who believe they have been discriminated against in violation of Section 50-9-25A.
- c. Section 405 of the Surface Transportation Assistance Act (STAA) of 1982 provides discrimination protection similar to protection provided under Section 50-9-25 to employees subject to safety regulations administered by the Federal Highway Administration's Bureau of Motor Carrier Safety. Section 405 of the STA Act protection falls within the jurisdiction of Federal OSHA only (beyond the screening process). Accordingly, Section 405 complaints shall be processed only by Federal OSHA since there are no provisions in the STA Act for referral to OSHA State plan States.

2. Interpretations. The general policy of the Department is to protect employee rights to the maximum extent permissible by law. In general, the Department shall abide by and apply the interpretations that OSHA has adopted in applying virtually identical provisions of the Federal Act. Those interpretive rulings are contained in 29 CFR 1977. Unless otherwise specified, those interpretations apply to Department enforcement of the State Act.

3. Scope. This chapter sets forth guidelines for handling discrimination complaints under 50-9-25 NMSA 1978 or Section 405 of the Surface Transportation Assistance Act of 1982. ("The Acts" as used in this chapter shall

include both laws unless specified otherwise.)

4. Responsibilities.

- a. The discrimination officer shall take complaints, conduct investigations, make recommendations for proper adjudication of complaints, assist in legal adjudication where necessary, and assist in negotiating settlement agreements.
- b. The discrimination officer's supervisor shall take and process complaints when the discrimination officer is not available, and review Field Investigative Reports.
- c. The Bureau Chief shall be responsible for the overall performance of the discrimination officer and supervisor. The Bureau Chief is authorized to negotiate settlement agreements on discrimination complaints.

B. Procedure.

1. Complaint Processing.

- a. Section 50-9-25B provides that "any employee who believes that he/she has been discharged or otherwise discriminated against by any person in violation of Section 50-9-25A may, within thirty days after such alleged violation occurs, file a complaint with the Secretary in writing and acknowledged by said employee, alleging such discrimination." (emphasis added.)
- b. The Bureau's policy is to make the agency as accessible as possible to employees who have legitimate discrimination complaints. Any employee or employee representative is permitted to file a discrimination complaint with any of the following offices or persons:
  - (1) Discrimination Officer;
  - (2) Discrimination Supervisor;
  - (3) Compliance Officer;
  - (4) Any other responsible office or agent of OHSB.
- c. Through this broad access to the procedures and rights provided under the Acts, employees are

ensured sufficient opportunity to file complaints and seek redress on alleged discrimination.

- d. At a minimum, when an oral complaint is filed, the complainant's name, address and telephone number shall be obtained.
- e. All complaints shall be recorded to ensure that the date of filing is properly documented.
- f. Any OHSB official receiving a discrimination complaint orally shall:
  - (1) Inform the discrimination officer immediately if the complainant is physically present in the office so that the complainant can be interviewed by telephone or in person. If location, time or workload restraints make this impractical, the OSHA-82 form shall be completed on the day of receipt of the complaint.
  - (2) Obtain and report the name, address, and telephone number at which the complainant can be reached by the discrimination officer if the complaint is received by telephone. Where practical, the discrimination officer shall contact the complainant as soon as possible after receipt of this information.

2. Receiving Complaints.

- a. Generally, in order for a complaint to be accepted for investigation, it must be:
  - (1) From an employee or an employee representative;
  - (2) In writing;
  - (3) Filed with the Secretary within the thirty day period immediately following the date of the alleged violation;
  - (4) Signed and acknowledged by the employee; and
  - (5) Contain allegations of discrimination in violation of Section 50-9-25A.

NOTE: Where the complainant has notified the Department orally within the thirty day

period, the Department shall accept written confirmation of the complaint if it is submitted after the oral complaint is made.

- b. The discrimination officer shall enter all cases into a case log which shall contain the name of the case, the date the complaint was received, the date the case was closed, and how the case was resolved.
- c. There may be circumstances which would justify tolling of the thirty day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; where the employee has, within the thirty day period, resorted in good faith to grievance-arbitration proceedings under a collective bargaining agreement; or where the employee has filed a complaint regarding the same general subject with another agency; or where the discrimination is in the nature of a continuing violation. The thirty day period may be extended to allow fair access to the anti-discrimination program, but no case older than three months will be accepted.
- d. Any complaints not meeting the formality requirements of Section 50-9-25A, supra, will be returned to the complainant with a description of the deficiencies in the complaint. This return will not prejudice the filing of a new or amended complaint. Where questions arise concerning the formality requirements, the Department's Legal Office shall be consulted. A complaint which has been returned for this reason shall be deemed to meet the thirty day time limitation regardless of whether the formality requirements have been met within that time period, if the original complaint met the time limit.
- e. If the complaint meets the formality requirements, the Bureau Chief shall notify the complainant, in writing, of the acceptance of the complaint and that an investigation will result.
- f. Enforcement of the provision of Section 50-9-25 is not only a matter of protecting the rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously

filed complaint will not necessarily result in termination of the investigation. Jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his or her complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

3. Complaint Screening. Upon receipt of any complaint or inquiry the discrimination officer shall interview the complainant by telephone or in person to determine if the complaint is appropriate for processing. If so, initial screening or investigation is the same of both Section 50-9-25 and Section 405.
  - a. The complainant shall be informed of the following information as applicable to the circumstances of the case:
    - (1) The coverage provided under Section 50-9-25 and Section 405;
    - (2) The options available under Section 50-9-25 and Section 405 after the screening and/or investigation.
  - b. Inappropriate for Investigation. Complaints are considered inappropriate for investigation if they are not filed in time without suitable mitigating circumstances or if they are outside of OHSB jurisdiction because there is no coverage for the employee under the OHS Act or there is no protected activity. If the case is inappropriate for investigation as set forth above, the complainant shall be specifically informed as to the reasons for such a finding.
    - (1) If the complainant does not agree with the finding and does not agree to an administrative closing of the case, it shall be processed until a finding of merit or non-merit can be issued under Section 50-9-25. Employee notification is effected as necessary.
    - (2) If the complainant accepts the reasons as to why the complaint is not acceptable, it shall be administratively closed. However, no complaint involving protected activity may be closed without a merit or non-merit decision

unless the complainant indicates he does not desire to pursue his complaint. The investigator may not solicit withdrawal of any complaint involving protected activity. All complaints closed by administrative closing or withdrawal will be confirmed by letter to the complainant stating the reasons the case is inappropriate for further action.

c. Prima Facie Complaints. If the allegations appear to show prima facie evidence of a violation, the Discrimination Investigation shall proceed as follows:

(1) Based on the evaluation of the allegation, an early attempt at a resolution of the complaint shall be undertaken.

(2) Otherwise, all such complaints shall be assigned for investigation.

4. Field Investigation. If the complaint meets the threshold requirements, the investigation shall begin as soon as possible.

a. The investigation shall be conducted in a manner that will most appropriately result in an informed determination; including but not limited to taking interview statements, investigation at the workplace, and review of the complainant's personnel files.

b. The discrimination officer shall take a statement from the complainant and his/her witnesses. If it appears there is prima facie evidence of a violation, the discrimination officer shall notify the respondent of the allegation and shall be told that an OHSB representative will be in contact at an early date. This contact with the respondent shall be made by certified mail, return receipt requested, or by hand delivery. The respondent shall be advised of the protection provided to employees under Section 50-9-25.

c. The investigating officer shall advise his/her supervisor of any novel, complex, or policy related issues which arise during the conduct of the investigation. On such issues the investigator or supervisor shall maintain direct contact with the legal office or Bureau Chief for advice and direction.

- d. After investigation has been completed, the discrimination officer shall submit a "Final Investigation Report," setting forth the facts of the case, the recommendations and the reasons therefor. Included in the Final Investigation Report shall be a section dealing with back pay, compensatory damages, and legal fees. The report shall be directed to the Bureau Chief.
- e. The investigator will conduct sufficient investigation to reach a recommendation of merit or nonmerit in each case. Withdrawals are not to be solicited by OHSB. If the complainant voluntarily and without prompting by OHSB indicates the desire not to pursue the case, the fact shall be reported to the Bureau Chief. The Bureau Chief shall satisfy him/herself that the withdrawal has not been solicited.
- f. A case may be administratively closed if the complainant does not cooperate in the completion of the investigation.

5. Arbitration or Other Agency Proceedings.

a. General.

- (1) Any employee who files a complaint under Section 50-9-25 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 complaints, investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may file an action in District Court regardless of the pendency of other proceedings.
- (2) The Department also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. Due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to complaints.
- (3) Where a complainant is in fact pursuing

remedies other than those provided by Section 50-9-25, postponement of the Secretary's determination and deferral to the results of such proceedings may be in order.

- b. Postponement of determination. Postponement of the determination would be justified where the rights asserted in other proceedings are substantially the same as rights under Section 50-9-25 and those proceedings are not likely to violate the rights guaranteed under the Act. The factual issues in such proceedings must be substantially the same as those raised by the complaint, and the forum hearing the matter must have the power to determine the ultimate issues 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 deferring 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 from 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 actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the complaint.

6. Determination.

- a. Section 50-9-25B requires that the Bureau Chief notify the complainant, within sixty days of receipt of the complaint, or his or her determination in the case. The sixty day notification provision is directory in nature. While every effort should be made to notify complainants in writing of the Bureau Chief's determination within sixty days, instances may occur which will make compliance impossible. Failure to meet the time requirement will not result in dismissal of the complaint.
- b. The supervisor shall conduct the review of the quality of the investigation using the criteria contained in the Federal OSHA investigator's manual. Final determination of the Bureau's

recommendation to the Secretary shall be made by the Bureau Chief.

- c. Once a decision has been made that a case is meritorious, the officer and/or Bureau Chief shall attempt to settle the case with the respondent. Settlement efforts are most successful when promptly initiated. The settlement shall be reviewed by the supervisor and the Bureau Chief.
- d. Once a determination has been made that the case is non-meritorious, the officer shall prepare a letter for the Bureau Chief's signature notifying the complainant and the employer of the determination. The letter to the complainant shall state that he/she has 18 days in which to appeal to the Secretary.
- e. Once the determination has been issued, all correspondence on the complaint shall be directed to the Department's Legal Office.

7. Appeals.

- a. If the discrimination investigator has made a non-merit determination and the Bureau Chief has dismissed the case the complainant may appeal the decision in writing to the Secretary of the Environment Department within 15 days of complainant's receipt of the dismissal letter.
- b. Within 16 days after receipt of the appeal, the Secretary shall notify the complainant that either the appeal has been denied or that the case will be investigated further. Within 60 days of notification of further investigation, the Secretary shall either dismiss the appeal or find that there has been a violation of NMSA 50-9-25 (the Occupational Health and Safety Act.)
- c. If the appeal is investigated, the Secretary shall notify the Complainant of his or her determination within 60 days after notification of the investigation.

8. Litigation. If the case is not promptly settled after the investigator and/or Bureau Chief initiates settlement negotiations, the Department's Legal Office will file a petition on behalf of the Secretary seeking restraint of the violation and such other relief as may be appropriate, "including rehiring or reinstatement of the

employee to his or her former position with back pay." Section 50-9-25(B), supra.

C. Substantive Requirements.

1. Persons prohibited from discriminating. Section 50-9-25, supra, specifically states that "no person shall discriminate against any employee" because the employee has exercised rights under the Act. Section 50-9-3(A) NMSA 1978 defines "person" as any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency or any other legal entity or their legal representatives, agents or assigns." Further, "employer" is defined as "any person who has one or more employees but does not include the United States." Section 50-9-3(C), supra. Consequently, the prohibitions of Section 50-9-3(A) NMSA 1978 are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. The term "person" would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee.
2. Person protected. All employees are afforded the full protection of Section 50-9-25, supra. For purposes of the Act, "employee" is defined as "an individual who is employed by an employer, but does not include a domestic employee or a volunteer nonsalaried firefighter." The Act does not define the term "employed." Coverage shall be determined upon the economic realities of employment relationship, rather than common law concepts. Employees of the federal government are not covered.
3. Unprotected activities distinguished.
  - a. Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of Section 50-9-25, supra, apply only when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him or her immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations.
  - b. At the same time, to establish a violation of

Section 50-9-25, supra., the employees engagement in protected activity need not be the sole consideration behind discharge or other adverse action, if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, the Act has been violated. Ultimately, the issue of whether a discharge was because of protected activity will be determined on the basis of the facts in each case.

4. Complaints under or related to the Act.
  - a. Discharge of, or discrimination against, an employee because the employee has filed "any complaint...under or related to this Act..." is prohibited. An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 50-9-10(B), NMSA 1978. However, this would not be the only type of complaint protected. The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application.
  - b. Complaints registered with federal, state or local agencies which has the authority to regulate or investigate occupational safety and health conditions are complaints "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.
  - c. Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination cause by a complaint to the employer.
5. Proceedings Under or Related to the Act. Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceedings under or related to the Act" is also prohibited. This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any

statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, and administrative rule making of adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he or she would be protected against discrimination resulting from such testimony.

6. Exercise of Any Rights Afforded by the Act.

- a. In addition to protecting employees from file complaints, institute proceedings, or testimony in proceedings under or related to the Act, Section 50-9-25, supra. also protects employees from discrimination occurring because of the exercise "of any right afforded by the Occupational Health and Safety Act". Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings. Certain other rights exist by necessary implication. For example, employees may request information from the Department; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Department in the cause of inspections or investigations could not subsequently be discriminated against because of their cooperation.
- b. As a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his or her attention. If corrections are not accomplished, or if there is a dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace or to seek the assistance of other public agencies which have responsibility in the field of health and safety. Under such circumstances, therefore, an employee would not ordinarily be in violation of Section 50-9-25 by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
- c. However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting him or herself to serious injury or death arising from a hazardous

condition, he or she would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury might be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his or her employer, and been unable to obtain, a correction of the dangerous condition.

d. Section 405 of the Surface Transportation Assistance Act of 1982. If the investigating officer believes there has been a violation of Section 405, she/he shall refer the case to the Federal OSHA Regional Office.

7. Employee refusal to comply with safety rules. Employees who refuse to comply with Section 50-9-5(a) NMSA 1978 (the General Duty Clause), any Occupational Health and Safety Regulation of the Board or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by the Act. This situation should be distinguished from refusals to work, as discussed above.