

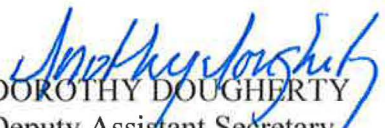


Reply to the attention of:

MAY 11 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH:


DOROTHY DOUGHERTY
Deputy Assistant Secretary


JORDAN BARAB
Deputy Assistant Secretary

FROM:


Mary Ann Claflahan, Director
Directorate of Whistleblower Protection Programs

SUBJECT: Clarification of Guidance for Section 11(c) Cases Involving
Temporary Workers

I. PURPOSE

This memorandum addresses three policy issues related to temporary workers who file whistleblower complaints under Section 11(c) of the Occupational Safety and Health Act of 1970. Temporary workers in this memorandum means current and former employees of staffing agencies and other temporary work arrangements such as seasonal work.

II. BACKGROUND

Cases involving employees of staffing agencies and other temporary employees can raise unique investigative considerations because such cases involve multiple respondents, and they frequently involve multiple adverse actions. Below are three policy guidelines based on Section 11(c) cases reviewed by the Directorate of Whistleblower Protection Programs as part of the Request for Review Process.

III. ISSUES

- A. Naming all relevant employers as respondents: Section 11(c)(1) prohibits any "person" from retaliating against any employee for engaging in activities protected by the Act. "Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator." 29 C.F.R. 1977.5(b). Thus,

host employers and relevant staffing agencies should be named as respondents, and normally should not be dismissed from an investigation until a settlement is reached or a determination is made. Failing to name a respondent may impede future settlements, impede relevant interviews, and make it difficult for complainants to receive reinstatement.

- Example 1: In one case, the complainant worked for a staffing agency that assigned the complainant to perform plumbing work for a host employer. The complainant raised concerns of potential asbestos to both the staffing agency and the host employer, and the host employer ordered the complainant off of the job site. The host employer and the staffing company both were initially named as respondents. However, after a review of the complainant's paystubs indicated that the complainant was paid by the staffing company, the case against the host employer was dismissed without further investigation.

- B. Extending damages beyond the length of a temporary assignment: A complainant who is a temporary worker may receive back pay beyond the length of the temporary assignment from which he or she was terminated. In *Young v. Park City Transportation*, a STAA case, the ARB recognized "the right of a seasonal worker to receive a back pay award that extends beyond the period of the complainant's seasonal employment" if there is evidence "indicating that the complainant would either have continued his employment beyond the seasonal work or that he would otherwise have been rehired for the next season." *Young v. Park City Transp.*, ARB No. 11-048, ALJ No. 2010-STA-065, slip op. at 4 (ARB Aug. 29, 2012). Similarly, in *Moravec v. HC & M Transportation*, a STAA case, the complainant was terminated from a seasonal assignment as a logging truck driver, but was awarded back pay beyond the end of the seasonal assignment. *Moravec v. HC & M Transp.*, ALJ No. 90-STA-44, slip op. at 8 (Sec'y Jan. 6, 1992). The complainant's damages were extended into the off-season because the respondent offered off-season work to "good drivers," and the complainant's training instructor considered him a "good driver." The complainant was also awarded back pay for the following logging season because the respondent usually re-hired drivers from the previous season.

Accordingly, in cases involving temporary workers, it is important to determine whether the complainant's co-workers were offered new assignments. In addition, the complainant should be asked whether he reapplied for an alternate assignment. If the complainant reapplied and was not re-hired, the complaint should be amended to include failure to re-hire.

- Example 2: A seasonal worker was laid off shortly after calling OSHA. The respondent's defense was that it was losing money, so it had to lay off workers outside of the usual seasonal cycle. The complainant alleged that other employees were rehired, but the investigation did not explore failure to rehire as a potential adverse action.

C. Retaliatory transfer. Although employees of staffing agencies and other temporary employees frequently change assignments, it is important to remember that offering an employee an objectively less desirable assignment may be an adverse action and should be investigated. If an employee is offered a less desirable assignment or transfer, a best practice is to determine what alternate assignments were available and whether similarly situated co-workers were offered similar assignments.

- Example 3: The complainant worked for a staffing firm that assigned him to work in an office building. Shortly after, the complainant raised safety concerns to the building manager and his staffing firm, the building manager requested that the complainant be transferred. The staffing firm offered the complainant a new assignment that paid significantly less money and was two hours away from the previous assignment. When the complainant refused the assignment, the staffing firm fired the complainant. The investigation did not determine whether the less desirable position was the only one available or whether additional similar positions became available during the course of the investigation.

IV. INVESTIGATIVE CONSIDERATIONS FOR SECTION 11(C) COMPLAINTS INVOLVING EMPLOYEES OF STAFFING COMPANIES AND OTHER TEMPORARY EMPLOYEES.

- The host employer as well as the staffing company normally should be named as respondents. In multiple employer situations, a respondent normally should not be dismissed from the investigation until a settlement is reached or a determination is made.
- Determine whether similarly-situated co-workers of the complainant were recalled or rehired. If so, the complainant's potential back pay award may be extended to include the additional assignment(s). It also may be appropriate to amend the complaint to include failure to rehire.
- Be sure to investigate whether a transfer was retaliatory in cases in which an employee of a staffing firm or other temporary employee may have been offered a less desirable position because of engaging in protected activity. In such cases, it is important to gather evidence indicating what positions respondent(s) had available at the time of the transfer and whether any of the complainant's similarly situated co-workers were transferred.