

Straight Track - A Hoey & Farina Newsletter

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The Hoey & Farina

RAILROAD RETALIATION REPORT

Part 7: OSHA INVESTIGATIONS OF WHISTLEBLOWER CLAIMS

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What does OSHA do when it investigates a retaliation claim?

Although OSHA has not yet issued regulations that specifically deal with retaliation claims filed by railroad employees, we do know how the OSHA **typically** investigates retaliation claims. Therefore, the following discussion must be taken as **general guidance**, pending any decision by OSHA to treat railroad employees differently than other workers.

Initial Contact

The employee who files a retaliation complaint is called **the complainant**. The complaint will be assigned to an OSHA investigator, who will then try to contact the complainant as soon as possible.

Sometimes an investigator is unable to find the complainant. If so, the investigator will call the complainant at different times during the day and evening. If unsuccessful, the investigator may mail a letter requesting that the complainant contact the investigator within 10 days. And if the investigator still does not hear from the complainant within 10 days, then OSHA can terminate the case.

The Field Investigation

If, after the initial telephone contact, the investigator decides there might be a valid case of retaliation, the investigator will proceed with a field investigation.

The field investigation consists of personal interviews, and on-site collection of documents and other evidence. Sometimes though, an investigator might also obtain testimony and other evidence by telephone, mail or electronically.

The First Meeting

The investigator will try to meet with the complainant as soon as possible for the first interview. As part of this interview, the investigator will ask for a signed statement detailing the complainant's allegations. The complainant is entitled to have an attorney or other personal representative present during this interview.

During the interview, the complainant will be asked to identify witnesses - including their names, home

addresses, telephone numbers, plus a summary of what each witness is expected to be able to testify about. The complainant will also be asked to furnish all documents relevant to the case. This includes such things as copies of discharge notices, reprimands, warnings, evaluations, earnings and benefit statements, grievances, job descriptions, employee handbooks, company rulebooks, medical records, and - if the complainant is losing his house - mortgage foreclosure papers.

The investigator will additionally ask the complainant to specify what kind of relief, restitution or compensation he or she is asking for. And if the complainant was fired, the investigator will advise the complainant about the obligation to search for replacement work.

If the investigator interviews the complainant by phone, the investigator will prepare a written statement. Then the investigator will mail the statement to the complainant, with instructions to review the document carefully, make any necessary corrections or additions, and return the signed statement.

Contacting the Employer

Similarly, the investigator will contact the employer to find out what its story is. The employer gets an opportunity to forward a written position statement.

The allegations made by the employer in its position statement are not a substitute for evidence, and the investigator will contact the employer to interview witnesses, review records, and obtain any other document pertaining to the employer's defense.

Other Interviews

The investigator will try to interview all of the employee's and employer's witnesses. This includes all company officials who had direct involvement in the case. The investigator should interview the witnesses separately, so that their testimony will not be "tainted" by having heard what other witnesses say.

If the employer designated an attorney to represent the company, then interviews with management and supervisory officials will ordinarily be scheduled through the attorney. The company's attorney is permitted to be present during interviews of management and supervisory witnesses. However, the employer's attorney does not have the right to be present - and should not be present - during interviews of non-management or non-supervisory employees.

Any witnesses interviewed by the investigator have a right to have a personal representative or attorney during the interview. Investigators are supposed to try to obtain a signed statement from each relevant witness.

If the witnesses appear to the investigator to be "rehearsed," intimidated or reluctant to speak while at work, the investigator may decide to just get their names and home numbers and contact these witnesses later, outside the workplace.

After hearing the employer's story, the investigator will re-contact the complainant and other witnesses as necessary, to resolve any discrepancies, or to deal with counter-allegations made by the employer.

Goals of the Investigation

During the investigation, the investigator will be looking into whether or not the employee can prove that:

- (1) He or she engaged in protected activity.
- (2) The employer knew of about or suspected that the employee engaged in protected activity.
- (3) The employee suffered adverse action (such as discharge, the demotion, reprimand, or harassment).

And,

(4) The employer retaliated against the employee because the employee engaged in protected activity.

The investigator will also be looking into whether or not the employer has evidence that there was a legitimate reason for taking adverse action against the employee, such as poor work, absenteeism, or misbehavior.

If the employer asserts one of these defenses, the investigator will look into whether or not the alleged reason for the adverse action was actually just a pretext or phony excuse. For example, the investigator will look for evidence that the employer knew that other employees engaged in similar misconduct. If these other employees did not receive the same severe punishment as the complainant, then this evidence of "disparate treatment" supports the conclusion that the employer's excuse for punishing the complainant was phony.

OSHA's Decision

After the field investigation, the investigator will evaluate the evidence and draw conclusions about whether the complainant can prove a violation of the law, and whether the employer can prove a legitimate defense. Then, after discussing the case with an OSHA supervisor, and perhaps with a Department of Labor attorney, the investigator will conduct a closing conference with the complainant.

The closing conference may be in person or by telephone. During the closing conference, the investigator will discuss OSHA's decision; how it was reached; and if the case is going forward, the next step in the process, such as a hearing before an Administrative Law Judge.