

OFFICE OF THE GENERAL COUNSEL  
Division of Operations Management

MEMORANDUM 73-85

December 21, 1973

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Unfair Labor Practice Cases in Which OSHA  
Proceedings Have Been Invoked

The Occupational Safety and Health Act of 1970 1/ provides in Section 11(c) that:

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with backpay.

Section 11(c) and the regulations 2/ published by the Department of Labor governing the enforcement of this section (a copy of these regulations is attached), provide both a prohibition against, and procedures for remedying, a variety of employer actions which are also proscribed by the NLRA.

1/ 29 USC 651 et seq.; LRX 6201; Occupational Safety and Health Reporter, 71:1101.

2/ 29 CFR 1977; Occupational Safety and Health Reporter, 51:2101.

In consequence, we may expect the filing of charges in the Regional Offices involving unfair labor practice conduct which violates the OSH Act and conduct which not only violates the OSH Act but also is the subject of complaints concurrently before the Secretary of Labor.

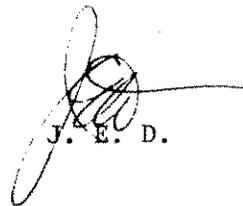
In cases, therefore, in which the alleged unfair labor practices also violate the OSH Act, the Region should, before issuing a complaint which would be otherwise warranted, ascertain whether:

a complaint has been or is to be filed under Section 11(c) of the OSH Act with the Secretary of the Department of Labor.

If so, or if:

the violation of the OSH Act consists of discrimination because of an employee's having "instituted or caused to be instituted any proceeding under or related to" the OSH Act or because of his participation in such a proceeding,

the Region should telephonically obtain clearance to issue complaint from its Assistant General Counsel in order that coordination with the Department of Labor may obviate duplicate litigation of the same issue. In cases where the discriminatee has complained only to his employer concerning safety matters and no complaint has been or is to be filed under Section 11(c), no clearance is required.



J. E. D.

Attachment

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MEMORANDUM 73-85

**REGULATIONS ON DISCRIMINATION AGAINST EMPLOYEES  
EXERCISING RIGHTS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT**

(Code of Federal Regulations, Title 29, Chapter XVII, Part 1977, effective January 29, 1973)

Title 29—Labor

**CHAPTER XVII—OCCUPATIONAL SAFETY  
AND HEALTH ADMINISTRATION, DE-  
PARTMENT OF LABOR**

**PART 1977—DISCRIMINATION AGAINST  
EMPLOYEES EXERCISING RIGHTS  
UNDER THE WILLIAMS-STEIGER OC-  
CUPATIONAL SAFETY AND HEALTH  
ACT OF 1970**

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**AUTHORITY:** Sec. 8(g) (2), Public Law 91-596, 84 Stat. 1600 (26 U.S.C. 657). Interpret or apply sec. 11(c), Public Law 91-596, 84 Stat. 1603 (29 U.S.C. 660).

GENERAL

**§ 1977.1 Introductory statement.**

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person

engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See Part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

**§ 1977.2 Purpose of this part.**

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

**§ 1977.3 General requirements of section 11(c) of the Act.**

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation. The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c) (1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

**§ 1977.4 Persons prohibited from discriminating.**

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) 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. Section 11(c) 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.

See, *Meek v. United States*, 136 F. 2d 679 (6th Cir., 1943); *Howe v. Judson C. Burns*, 137 F. 2d 37 (3rd Cir., 1943).

#### § 1977.5 Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See, *U.S. v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, *NLRB v. Lamar Creamery*, 246 F. 2d 8 (5th Cir., 1957). 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. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

(c) In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

#### § 1977.6 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 11(c) apply 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 immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. See, *NLRB v. Dixie Motor Coach Corp.*, 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If 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, section 11(c) has been violated. See, *Mitchell v. Goodyear Tire & Rubber Co.*, 278 F. 2d 562 (8th Cir., 1960); *Goldberg v. Bama Manufacturing*, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

#### SPECIFIC PROTECTIONS

#### § 1977.9 Complaints under or related to the Act.

(a) Discharge of, or discrimination against, an employee because the em-

ployee has filed "any complaint . . . under or related to this Act . . ." is prohibited by section 11(c). An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). 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, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "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. (Section 2(1), (2), and (3)). 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 caused by a complaint to the employer.

#### § 1977.10 Proceedings under or related to the Act.

(a) Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

#### § 1977.11 Testimony.

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act

is also prohibited by section 11(c). 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 or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

#### § 1977.12 Exercise of any right afforded by the Act.

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b) (1) On the other hand, review of the Act and examination of the legislative history discloses that, 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 attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must 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 insuff-

icient 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 employer, and been unable to obtain, a correction of the dangerous condition.

[38 FR 4577]

#### PROCEDURES

#### § 1977.15 Filing of complaint for discrimination.

(a) *Who may file.* A complaint of section 11(c) discrimination may be filed by the employee himself, or by a representative authorized to do so on his behalf.

(b) *Nature of filing.* No particular form of complaint is required.

(c) *Place of filing.* Complaint should be filed with the Area Director (Occupational Safety and Health Administration) responsible for enforcement activities in the geographical area where the employee resides or was employed.

(d) *Time for filing.* (1) Section 11(c)(2) provides that an employee who believes that he has been discriminated against in violation of section 11(c)(1) "may, within 30 days after such violation occurs," file a complaint with the Secretary of Labor.

(2) A major purpose of the 30-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.

(3) However, there may be circumstances which would justify tolling of the 30-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 30-day period, resorted in good faith to grievance-arbitration proceedings under a collective bargaining agreement or filed a complaint regarding the same general subject with another agency; where the discrimination is in the nature of a continuing violation. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

#### § 1977.16 Notification of Secretary of Labor's determination.

Section 11(c)(3) provides that the Secretary is to notify a complainant within 90 days of the complaint of his determination whether prohibited discrimination has occurred. This 90-day provision is considered directory in nature. While every effort will be made to notify complainants of the Secretary's determination within 90 days, there may be instances when it is not possible to meet the directory period set forth in section 11(c)(3).

#### § 1977.17 Withdrawal of complaint.

Enforcement of the provisions of section 11(c) is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily re-

sult in termination of the Secretary's investigation. The Secretary's 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 complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

#### § 1977.18 Arbitration or other agency proceedings.

(a) *General.* (1) An employee who files a complaint under section 11(c) of the Act 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 section 11(c) complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may file action in U.S. district court regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. See, e.g., *Boy's Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Carey v. Westinghouse Electric Co.*, 375 U.S. 261 (1964); *Collier Insulated Wire*, 192 NLRB No. 150 (1971). By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 11(c) complaints.

(3) Where a complainant is in fact pursuing remedies other than those provided by section 11(c), postponement of the Secretary's determination and deferral to the results of such proceedings may be in order. See, *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156 (1962).

(b) *Postponement of determination.* Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 11(c) and those proceedings are not likely to violate the rights guaranteed by section 11(c). The factual issues in such proceedings must be substantially the same as those raised by section 11(c) complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination. See *Rios v. Reynolds Metals Co.*, F.2d (5th Cir., 1972), 41 U.S.L.W. 1049 (Oct. 10, 1972); *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir., 1971).

(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-to-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 of 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 other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 11(c) complaint.

#### SOME SPECIFIC SUBJECTS

#### § 1977.21 Walkaround pay disputes.

(a) Complaints involving claims of discrimination based upon employer failure to pay employees who participate in section 8(e) Federal walkaround inspections of a workplace will require close scrutiny of the facts in each instance. However, as a general rule, such refusal to compensate for time so spent is not per se discriminatory. On the other hand, there may be situations in which a finding of discrimination would be warranted on the basis of specific facts in the proceeding. For example, an employer's past practice respecting payment for certain other safety and health activities on regular working time may result in a determination that the failure to compensate for walkaround is discriminatory. Such past practice must entail, however, activities which are closely analogous to walkaround inspection activities. The practice of compensating attendees at safety committee or other safety meetings is not generally to be regarded as evidence of closely analogous practices where such committees and meetings are purely educational and advisory in nature.

(b) It should be emphasized that an employer is in no way precluded by the Act from making voluntary agreements to pay employees for time spent by them while participating in walkaround inspections.

#### § 1977.22 Employee refusal to comply with safety rules.

Employees who refuse to comply with occupational safety and health standards 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 section 11(c). This situation should be distinguished from refusals to work, as discussed in § 1977.12.

#### § 1977.23 State plans.

A State which is implementing its own occupational safety and health enforcement program pursuant to section 18 of the Act and Parts 1902 and 1952 of this chapter must have provisions as effective as those of section 11(c) to pro-

lect employees from discharge or discrimination. Such provisions do not divest either the Secretary of Labor or Federal district courts of jurisdiction over employee complaints of discrimination. However, the Secretary of Labor

may refer complaints of employees adequately protected by State Plans' provisions to the appropriate state agency. The basic principles outlined in § 1977.18, supra will be observed as to deferrals to findings of state agencies.

Signed at Washington, D.C., this 19th day of January 1973.

*Richard P. Schwartz,*  
*Solicitor of Labor.*

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[38 FR 2681]