



Discrimination Investigation Manual

State of Hawaii

Department of Labor and Industrial Relations

Hawaii Occupational Safety and Health Division

April 2007

Executive Summary

The Department of Labor and Industrial Relations' ("DLIR") Hawaii Occupational Safety and Health ("HIOSH") Discrimination Investigations Manual, dated April, 2007, provides guidance for HIOSH investigators to investigate complaints of discrimination under Chapter 396-8(e), Hawaii Revised Statutes (HRS). The HIOSH Discrimination Investigation Program is intended to be as effective as OSHA. Chapter 396-8(e), HRS, is equivalent to OSHA 11(c) whistleblower statutes.

Significant Changes

References to Federal position/agency in this Discrimination Investigation Manual have been replaced with the State of Hawaii equivalent position/agency throughout the manual.

Chapter 1, paragraph 5. Release of Investigation Information, page 1-5, Freedom of Information Act (FIOA) was replaced with the State of Hawaii's Uniform Information Practice Act (UIPA).

Chapter 2, paragraph III. Screening and Docking, page 2-1, filing time is extended to 60-day statutory time limit for section 396-8(e) complaints.

Chapter 4, paragraph VI. Appeals, page 4-2, Appeals process in Hawaii differs from the federal system. Both the complainant and the respondent can appeal their case.

Chapter 6, Settlement Agreement, Hawaii Revised Statute does not provide front pay and punitive damages.

Chapter 7, paragraph IV. Interpretations, page 7-1, use 11(c), and 29 CFR 1977 to clarify common issues the investigator face or are likely to face.

Chapter 8, covers other Whistleblower Acts not covered by HIOSH

Chapter 9-Chapter 15 is reserved.

The sample letters appearing at the end of each chapter have been modified to use a State of Hawaii Letter head and corresponding State position(s).

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- I. Purpose.** This instruction sets forth policy, procedures and other information relative to the handling of discrimination complaints within the responsibility of Hawaii Occupational Safety and Health Division (HIOSH). In its entirety, this manual is a ready reference for all staff in the performance of their daily duties.
- II. Scope.** This instruction applies State-wide.
- III. Significant Changes.** Reserved.
- IV. Cancellation.** Reserved
- V. References.** DIS 0-0.9, Whistleblower Investigation Manual, August 22, 2003..
- VI. Action Information.** This manual shall be used as a primary vehicle for disseminating policy, procedures and information to Discrimination investigation staff. The policies and procedures contained herein shall be adhered to unless prior approval is given by the Administrator in the event of unique local circumstances.
- VII. Federal Program Change.** Reserved.

This manual is intended to provide guidance regarding some of the internal operations of the HIOSH and is created solely for the benefit of the State. No duties, rights, or benefits, whether substantive or procedural, are created or implied by this document. The contents of this manual are not enforceable by any person or entity against the Department of Labor and Industrial Relations (DLIR) or the State of Hawaii. Guidelines which reflect current precedents do not necessarily indicate acquiescence with those precedents.

Chapter 1

Introduction

I. Introduction.

- A. The Occupational Safety and Health Act, Public Law 91-596, is a federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the nation. By terms of the Act, every person engaged in a business affecting commerce is required to furnish each employee 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.
- 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 record keeping requirements. Enforcement proceedings initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (Occupational Safety and Health Review Commission), and judicial review are provided by the Act. In addition, States that desire to assume responsibility for development and enforcement of standards may submit plans to the Secretary of Labor and receive approval for such development and enforcement. Hawaii is an approved State Plan under section 18(e) of the Act.
- C. Employees and representatives of employees are afforded a wide range of substantive and procedural rights under both the Act and State Law, Chapter 396, Hawaii Revised Statutes (HRS). Moreover, effective implementation of the Law and achievement of its goals depend in large measure upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity. It is essential that such participation and employee rights be preserved if the fundamental purposes of the Act and the Law are to be realized.
- D. Section 396-8(e), HRS, provides, in general, that no person shall discharge or in any manner discriminate against any employee because the employee has exercised rights under the State Law. The Administrator has over-all responsibility for the investigation of discrimination complaints under section 396-8(e), HRS. The Administrator has authority to dismiss non-meritorious complaints (absent withdrawal), approve acceptable withdrawals, and negotiate settlement of meritorious complaints.

II. Functional Responsibilities.

A. Responsibilities.

1. Administrator. The Administrator has overall responsibility for all discrimination investigations. The administrator is authorized to issue determinations and approve settlement of complaints filed under the Law.
2. Supervisory Investigator (SI). Under the direction of the Administrator, the SI responsibilities include, but are not limited to:
 - a. Conducts screening of incoming complaints to determine whether the allegations warrant field investigation and forwards the complaint to OH Branch for investigation.
 - b. Ensures that safety and health ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office or agency.
 - c. Develops policies and procedures for the Discrimination Program.
 - d. Processes appeals that are to be presented to the Hawaii Labor Relations Board (HLRB).
 - e. Coordinates training for field staff.
 - f. Provides technical assistance to the field investigative staff.
 - g. Distributes significant legal developments to field staff.
 - h. Maintains a statistical database on discrimination investigations.
 - i. Assists in developing legislation on discrimination matters.
 - j. Acts as liaison between the Discrimination Program and other government agencies.
 - k. Conducts audits of case files to ensure consistency.
 - l. Assists in the investigation of complex cases or provides assistance in the investigation of such cases as requested by the Administrator.
 - m. Reviews Final Investigative Report (FIR) and recommends the determination to the Administrator.
 - n. As assigned, monitors and evaluates State Plan Discrimination programs and investigates Complaints Against State Program Administration (CASPA) dealing with those programs.
3. Occupational Health (OH) Branch Manager. Under the guidance and direction of the Administrator, the OH Branch Manager is responsible for implementation of policies and procedures, and for the effective supervision of field investigations, including the following functions:
 - a. Receives discrimination complaints from the Administration and Technical Support Branch (ATS).
 - b. Schedules assignment of investigative cases to the individual Investigators.
 - c. May investigate and conduct settlement negotiations for cases that are unusual or of a difficult nature.
 - d. Provides guidance, assistance, supervision, and direction to the Investigators during the conduct of investigations and settlement negotiations.
 - e. Reviews FIR for comprehensiveness and technical accuracy.

- f. The OH Branch Manager recommends a determination to the Supervisor Investigator (SI) after case file review.
 - g. At the direction of the Administrator, the OH Branch Manager is responsible for coordinating and providing liaison with the Department of the Attorney General – Labor Division.
 - h. Recommends to the SI changes in policies and procedures in order to better accomplish agency objectives.
 - i. Provides field training for Investigators.
 - j. Performs necessary and appropriate administrative and personnel actions such as performance evaluations.
 - k. Performs other special duties as assigned by the Administrator.
4. Investigator. The Investigator carries out responsibilities under the direct guidance and supervision of the OH Branch Manager which include, but are not limited to, the following functions:
- a. Reviews case files in field offices for background information concerning any other proceedings which relate to a specific complaint.
 - b. Interviews complainants and witnesses and obtains written statements as necessary and obtains supporting documentary evidence as available.
 - c. Follows through on leads resulting from interviews and statements.
 - e. Interviews and obtains written statements from respondents' officials, reviews pertinent records, and obtains relevant supporting documentary evidence.
 - f. Applies knowledge of the legal elements and evaluating the evidence revealed, writes an investigation report detailing the facts of the case, analyzing the evidence, and recommending appropriate action to the OH Branch Manager.
 - g. Negotiates with the respondent in merit cases to obtain a settlement agreement which provides prompt resolution and satisfactory remedy.
 - h. Monitors implementation of agreements, Hawaii Labor Relations Board (HLRB) orders, court orders, as assigned, determining specific action necessary and sufficiency of action taken or proposed by the respondent. If necessary, recommends further legal proceedings to obtain compliance.
 - i. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings.
5. Occupational Safety and Health Compliance Officer (OSHCO). Each OSHCO is responsible for maintaining a general knowledge of the protections under section 396-8(e), HRS. Using this knowledge, the OSHCO may then inform employers and employees of their responsibilities and rights granted under the Law.
6. Deputy Attorney General (DAG). The DAG represents the Director before the HLRB, and any subsequent court proceedings under the Law. The DAG may also be asked to provide legal advice in certain situations.
7. Hawaii Labor Relations Board (HLRB). The HLRB is the forum which a complainant or respondent can appeal HIOSH discrimination determinations.

B. Personal Conduct and Activities.

1. Courtesy to the Public. The DLIR emphasizes that the proper and courteous discharge of duties and responsibilities by OSHCOs and Investigators is essential to the effective administration of the Law. The success of the program depends upon their knowledge and understanding of the laws and regulations as well as upon their courtesy and tact in dealing with employers and employees. Investigators represent the State of Hawaii and must at all times conduct themselves in such a manner as to reflect that responsibility. They must never indulge in conduct unbecoming their positions, even when such conduct is invited or incited by those with whom they are dealing.
2. Correspondence with the Public. Investigators are the primary public relations representatives of the DLIR. All written correspondence received by Investigators from the public must be responded to in a prompt and courteous manner. The Investigator must respond to correspondence which is directed to an Investigator but which the Investigator must forward to a higher authority, other agency or person. The Investigator must notify the writer that the original correspondence is being forwarded for action by the authority, agency or person. Other inquiries received by Investigators which are outside the Investigator's scope of normal job activities must be forwarded to the OH Branch Manager for appropriate action.
3. Acceptance of Gratuities. No HIOSH employee shall solicit, accept or receive, directly or indirectly, a favor, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstance in which it can reasonably be inferred that the gift is intended to influence the HIOSH employee in the performance of employee's official duties or is intended as a reward for any official action on the employer's part, including, but not limited to, instances where a person, corporation, group or entity:
 - a. Has sought or is seeking to obtain contractual or other business or financial relationships with the State DLIR;
 - b. Conducts operations or activities which are regulated by the State DLIR;
 - c. Has interests which may be substantially affected by such employee's performance or nonperformance of official duty, or
 - d. Is attempting to reward or influence the employee's official actions.
4. Subpoenas and Testimony.
 - a. Subpoenas Served on Investigators. An Investigator, upon being served with a subpoena, must immediately communicate with the OH Branch Manager or the Administrator and forward all pertinent information. The Administrator will refer the matter to the DAG for action.
 - b. Testifying in Proceedings. The Investigator may be required to testify in proceedings on behalf of the State. The Investigator should keep this fact in mind when conducting an investigation and recording observations. Notes and reports must reflect conditions accurately and must be included in the case file. If the Investigator is called on to testify, the reports and notes will be invaluable as a tool for recalling actual conditions and statements and reinforcing the facts of the case.

5. Release of Investigation Information.

- a. Investigation materials include notes, work papers, memoranda, records, and audio or video tapes received or prepared by an Investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties. Such original material and all copies must be included in the case file, where necessary, to support the investigative findings. These records are the property of the State and a part of the case file.
- b. The information and statements obtained from investigations are confidential except for those which may be released under the Uniform Information Practice Act (UIPA), Chapter 92F, HRS. Requests for the public release of any information must be directed to the Administrator for release according to the current UIPA.
- c. Cases under §396-8(e), HRS shall be considered open investigations until a final determination has been made and becomes a final order. If the case is in contest, the case is considered open until a settlement is reached or a decision and order which is not appealed is issued. Information in a case may be withheld under UIPA rules until the release of information no longer can adversely impact the division's ability to carry out its mission; e.g., a case cannot be appealed.
- d. After the case is closed, much of the case file material is available for disclosure upon receipt of a UIPA request or a request from another state agency. In a civil case, requests for the records, even if served with a Subpoena Duces Tecum, are normally denied because of §396-14, HRS, which prohibits the use of investigative material in a civil proceeding. Certain parts of the investigative report may be withheld from release when § 92F-13, HRS, applies, otherwise, the entire narrative report (except the privileged materials), will normally be disclosed upon request, including interviews of officials representing the respondent, interviews of complainant (except the identity of confidential informants) and interviews of other individuals who have not requested confidentiality. Such release shall not constitute a clearly unwarranted invasion of personal privacy in reference to § 92F-14, HRS.
- e. Any inquiry received by an Investigator concerning an investigation must be transmitted to the OH Branch Manager and the appropriate document custodian.
- f. The Form OSHA-82 or 87, Discrimination Case Activity Worksheet, may be released in open cases after consultation with the OH Branch Manager.
- g. If, during the course of an investigation, the employer identifies any materials obtained as a trade secret or confidential commercial or financial information, and the Investigator has no reason to question such identification, information obtained in such areas will be labeled "Confidential Information." If the Administrator agrees with this characterization, it will not be disclosed except if necessary for public health and safety.

Chapter 2

Complaint Intake and Investigation Programming

Time invested with the complainant in the beginning will earn great dividends in the end.

- I. **Scope.** This chapter explains the general process for receipt of discrimination complaints under section 396-8(e), HRS, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in OSHA's Integrated Management Information System (IMIS). Unique requirements for complaint-taking procedures, screening, coverage, timely filing, etc., will be discussed in subsequent chapters.
- II. **Receipt of Complaint.** Any employee, former employee or their authorized representative is permitted to file complaints under section 396-8(e), HRS, in writing with HIOSH. The discrimination complaint shall be signed with an original signature by the employee.
 - A. When a complaint is received at HIOSH, basic information about the complaint must be recorded on a Form OSHA-82 or 87 by the SI, and forwarded to the OH Branch Manager immediately. In every case, the date of filing must promptly be recorded.
 - B. Complaints received at the District Offices or through other governmental units normally are forwarded to the Administration Technical Support Branch (ATS) for completion of the OSHA-82 or 87.
 - C. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the respondent company's name, address, and phone number; date of filing; date of adverse action; a brief summary of the alleged discrimination addressing the *prima facie* elements of a violation (protected activity, respondent knowledge, adverse action, and nexus), and, if known, whether a safety and/or health complaint has also been filed with HIOSH or other enforcement agency.
- III. **Screening and Docketing.**
 - A. As soon as possible upon receipt of the complaint, the available information should be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may require preliminary contact with the complainant to obtain additional information or to explain to the complainant why the case cannot proceed to investigation. Complaints which pass this initial screening will be docketed for investigation. The term "docket" means to formally notify both parties in writing of HIOSH's receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the IMIS (the IMIS automatically assigns the local case number).

- B. Complaints which do not allege a *prima facie* allegation, or are not filed within the 60-day statutory time limit for section 396-8(e), HRS, will not be docketed if the complainant indicates concurrence with the decision to close the case administratively. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed with appeal rights. Complaints which are not docketed, based on the initial screening, will not be assigned a case number or entered into the IMIS. A memorandum will be prepared documenting the screening interview, and the SI will send the complainant a letter verifying administrative closure of the case.
- C. Cases that are assigned for investigation will be given a local case number which uniquely identifies the case. The IMIS automatically designates the case number when a new complaint is entered into the system. All case numbers follow the format 1111-22-333 where each series of numbers is represented as follows:
 - 1. The HIOSH office number (per the *World-wide Geographic Code Manual*)
 - 2. The fiscal year.
 - 3. The serial number of the complaint for the office.
- D. As part of the docketing procedures, when a case is opened for investigation, the OH Branch Manager will send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an Investigator. The name, address, and telephone number of the Investigator will be included in the docketing letter.
- E. Also at the time of docketing, or as soon as appropriate, the OH Branch Manager will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the respondent's due process rights and the timely completion of the investigation.
- F. Designation of Representative Form (See page 2-11) must be attached to this letter to allow the respondent the option of designating an attorney or other official representative.
 - 1. The respondent notification will be sent by certified mail, return receipt requested. The receipt number will be identified on the letters and the receipts stapled to the file copy of the letters to maintain accountability.
 - 2. Prior to sending the notification letter, the OH Branch Manager must first determine if a compliance inspection is pending. If such an inspection is pending, and the branch requests a short delay, the notification letter will not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.
- G. During periods of heavy case loads it may be appropriate to send the complainants a questionnaire for them to complete and return to the Investigator or OH Branch Manager. Questionnaires may only be used with the explicit approval of the Administrator. The questionnaire must include any information already submitted by the complainant and be used only to obtain supplemental data. Questionnaires may

not be used in lieu of signed statements. A sample questionnaire can be found at the end of this chapter.

IV. Timeliness of Filing.

- A. Discrimination complaints must be filed within 60-days of the adverse action. If the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. The first day of the time period is the day after the alleged adverse action. Generally, the date a complaint is considered filed is the day the complainant visits, emails, faxes or telephones a HIOSH official. For complaints sent by mail, the date filed is the date of the post mark. If the post mark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if HIOSH offices are closed, the next business day will count as the final day. If the complainant does not provide all the necessary information to further process the complaint, the filing date will then be the date when all necessary information is obtained.
- B. Complaints filed after the deadline will normally be closed without further investigation. However, there are certain extenuating circumstances which could justify tolling these statutory filing periods for equitable principles. If the complainant does not withdraw, a dismissal must be issued if the complaint was untimely and there was no valid extenuating circumstance. The general policy is outlined below, but each case must be considered individually.
- C. An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following. (These circumstances are not to be considered all-inclusive, and the reader should refer to section 12-57-8, Hawaii Administrative Rules (HAR), and current case law for further information.)
 - 1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the discriminatory grounds for the adverse action.
 - 2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
 - 3. The employee is unable to file within the required period due to a natural disaster such as a storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
 - 4. The employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the complainant (e.g., HIOSH discrimination complaint is filed with the Hawaii Civil Rights Commission).
- D. Conditions which will not justify extension of the filing period are, among others:
 - 1. Ignorance of the statutory filing period,
 - 2. Filing of unemployment compensation claims,
 - 3. Filing a workers' compensation claim,
 - 4. Filing a private negligence or damage suit, or

5. Filing a grievance or arbitration action.

V. Scheduling the Investigation.

- A. The OH Branch Manager will assign the case to an Investigator taking into consideration such factors as the Investigator's current caseload, work schedule, geographic location, and statutory time frames. The assignment will be documented by means of an assignment memorandum to the Investigator. In cases involving complex issues or unusual circumstances, the OH Branch Manager may conduct the investigation or may assign a team of Investigators.
- B. As part of the case assignment process, the OH Branch Manager will prepare a case file containing the original complaint and other evidentiary materials supplied by the complainant to be given to the investigator assigned. A duplicate case file will also be prepared and maintained by the OH Branch Manager until the investigation is completed and returned to the OH Branch Manager for review.
- C. The Investigator will generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the OH Branch Manager. Also, priority will be given to discrimination investigation. Investigator can perform inspections or other assignments during down time.
- D. Case Transfer.
 - 1. Careful planning must be exercised in the docketing of cases to avoid the need to transfer case responsibility from one Investigator to another. However, if caseload or case priority considerations warrant a transfer of cases, such transfer must be documented in the case file.
 - 2. Only the OH Branch Manager is authorized to transfer cases among Investigators under his/her supervision.
- E. Investigative Assistance. When assistance from another island or state is needed to interview witnesses or obtain evidence, the Administrator will handle the coordination. The Investigator requiring assistance will contact the OH Branch Manager, who will coordinate with the appropriate contacts.

Sample Documents

from

Chapter Two

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Sample Administrative Closure Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dlir.hiosh@hawaii.gov

[date]

Mr. U. R. Complainant Street Address City, State ZIP

Dear Mr. Complainant:

This is to confirm your telephone conversation of April 1, 2003, with Ms. I. M. Investigator of my staff. It is my understanding Ms. Investigator explained to you that we are unable to pursue investigation of your claim because your complaint was not filed within the 60-day time period required by Section 396-8(e) of the Hawaii Occupational Safety and Health Law. Therefore, we are administratively closing our files on your claim.

I regret that we are unable to assist you further in this matter. Thank you for your interest in occupational safety and health.

Sincerely,

Manager
Occupational Health Branch



***Sample Assignment Confirmation Memorandum Section 396-8(e)
Complaint***

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
(HIOSH)**

INTER-OFFICE MEMORANDIUM

[date]

MEMORANDUM FOR: U.R. Investigator

FROM: I.M. Supervisor

SUBJECT: ABC Company/Complainant/Case No. 1501-07001

ASSIGNMENT CONFIRMATION

This is to confirm the assignment of the above case to you for investigation and processing as prescribed in HIOSH policy and procedure statements. The complaint in this matter was filed on [date].

If you anticipate any problems in completing this case within the statutory time frames, or if any problems occur in the course of the investigation, contact me as soon as possible.

Sample Complainant Notification Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dlijr.hiosh@hawaii.gov

[date]

Mr. U. R. Complainant Street Address City, State ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. Complainant:

This is to acknowledge receipt of your complaint of discrimination under Section 396-8(e) of the Hawaii Occupational Safety and Health Law. An investigator, <Investigator's Name>, will get in touch with you as soon as possible to request your assistance in the investigation of your complaint. Please save any evidence bearing on your complaint, such as notes, minutes, letters, or check stubs, etc., and have them ready when the investigator meets with you. It will be helpful for you to jot down a brief factual account of what has happened and for you to prepare a list of the names, addresses (including e-mail), and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know, for the use of the investigator. If you have already provided us with this information, please feel free to supply us with additional information that you may have.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part.

Please address any questions, material, or change of address or telephone number to <Investigator's Name>. You may call him/her at 586-9090.

Sincerely,

Manager
Occupational Health Branch



Sample Respondent Notification Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dir.hiosh@hawaii.gov

[date]

ABC Company Street
Address City, State
ZIP

Re: ABC Company/Complainant/Case No. 1501-07-001

Dear Employer:

RE: Employer's Name/Complainant's Name/Case No.

The Hawaii Occupational Safety and Health Division (HIOSH) has received a complaint from <Complainant's Name> alleging a violation of Section 396-8(e), of the Hawaii Occupational Safety and Health Law, Hawaii Revised Statutes (HRS). Specifically, <Complainant's name> alleges that he/she was discriminated against for <reason for Adverse Action> on <Date>.

<Investigator's Name> has been assigned to the investigation. He/She will be interviewing and taking written statements from you and others involved in this case, as well as requesting to see applicable documents, including personnel records pertinent to this investigation. Your cooperation will be appreciated so that all of the relevant facts of the case will be considered.

Section 396-8(e), HRS, provides that employees who engage in protected activity, which may include filing complaints about safety and health or even inquiring about company's safety and health policies, be protected against retaliation. Remedies may include reinstatement, back pay, purging personnel files of adverse material, and other remedies as appropriate. A penalty of \$1,000 may also be imposed upon a finding of discrimination under Section 396-8(e).

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative, please have your representative complete the "Designation of Representative" Form enclosed and forward it promptly. All communications and submissions should be made to the investigator as indicated. Your cooperation with this office is invited so that all facts of the case may be considered.



Employer's Name
Date
PAGE 2

Voluntary settlement of this matter can be effected through a settlement agreement. You may choose to discuss settlement with <Investigator's Name> at this time, the benefit of which is to reduce expenses and avoid any finding of discrimination or assessment of penalty, or you may choose to respond with a statement of your position to this allegation and include the documents to support your position. We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in response to the allegations that you have discriminated against < Complainant's Name> in violation of the Act. You may contact < Investigator's Name> at (808) 586-9090, if you have any questions or wish to discuss settlement.

Sincerely,

Manager
Occupational Health Branch

Enclosure



Sample Designation of Representative Form

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

DESIGNATION OF REPRESENTATIVE

«Complainant_Name»	
vs	Case Number: «Case_Number»
«Employer_Name»	

TO: «Inspector_Name»
830 Punchbowl Street, Room 425
Honolulu, HI 96813
Phone: (808) 586-9090

The undersigned hereby enters his appearance as representative of

In the above captioned matter:

_____ Signature of Representative	Representative's Address and ZIP Code
_____ Type or Print Name	
_____ Title	_____ Area Code Telephone Number
_____ Date	_____ E-Mail Address

Sample Followup Questionnaire

COMPLAINANT FOLLOW-UP QUESTIONNAIRE

We are in receipt of your complaint dated _____ alleging that discriminatory action has been taken against you. To assist us in better serving you, we request that you complete this follow-up questionnaire. Please correct any misinformation that has been recorded and provide us with information that is missing. You may also submit copies of any documentation such as (1) discharge slips, (2) pay stubs, (3) performance evaluations, and/or any other evidence which you believe support your claim. Please note that failure to return this completed form, to the address noted above, as soon as possible may result in a delay of our investigation and closing of your file.

Please print in black or blue ink, or type

1. Complainant Information: (Please notify this office immediately of any change)

Name: _____ Address: _____

Contact Telephone Number: _____

2. Respondent Information:

Company Name: _____ Address: _____

Company Representative: _____

Contact Telephone Number: _____

3. How many employees work at this company or job site: _____

4. What kind of business is this, e.g., manufacturer, construction, shipping, transportation, agriculture?

5. Do you belong to a Union? If so, what is the Name, Local, and Representative name and telephone number?

6. What was the first date of your employment? _____

7. What was your last date of employment, if applicable? _____

8. What was your job title? _____

9. Briefly describe your job duties and responsibilities:

10. What type of adverse action was taken against you, e.g., termination, suspension, lay-off?

11. What was the date of this adverse action? _____

12. In your opinion, *why* did your employer take adverse action against you?

13. What was your final wage rate? \$ _____ per (Circle one) Hour / Week / Month / Year

14. What was the average number of hours that you worked per week? _____

15. What is the name and job title of your immediate supervisor:

16. Did HIOSH (or other agency) *conduct an inspection* at your work site? If so, what was the date of the inspection, and its outcome?

17. If you *refused* to do a work assignment, describe *WHY* you refused to do it, and what assignment did you refuse to do:

18. Have you worked since leaving this employment? If so, where?

19. Have you looked for another job since leaving this employment? Circle one: **YES / NO**

20. What will the employer say is the reason the adverse action was taken against you?

20. If your employment was terminated, are you interested in returning to work for your previous employer? Circle one: **YES / NO**

21. In the box below, list names and telephone numbers of witnesses who can support your claim. Be sure to print clearly:

Witness Name	Telephone Number with Area Code

22. Additional comments (Please feel free to attach additional pages, if necessary):

ATTENTION! READ THE FOLLOWING SENTENCE CAREFULLY BEFORE SIGNING!

I certify that the responses in this questionnaire are true and correct to the best of my knowledge and acknowledge that knowingly providing false information may subject me to the penalties outlined in Section 396-10 (m) of the Hawaii Occupational Safety and Health Law, and may negatively impact the outcome of my case.

Signature: _____ Date _____

RETURN THIS AS SOON AS POSSIBLE TO:

**Mr. I.M. Supervisor Supervisory Investigator, Department of Labor and Industrial Relations/HIOSH Street
Address City, State Zip Code Telephone Number Fax Number**

Chapter 3

Conduct of the Investigation

It's more of an art than a science.

I. Scope. This chapter sets forth the policies and procedures Investigators must follow during the course of a discrimination investigation. It does not attempt to cover all aspects of a thorough discrimination investigation, and it must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. Investigators should consult with the OH Branch Manager when additional guidance is needed.

II. Case File.

- A. Original Evidentiary Material. The Investigator will normally receive a standard case file containing the OSHA-82 or 87, transmittal memorandum, discrimination tracking log, copies of initial correspondence to the complainant and respondent, and any other evidentiary material initially supplied by the complainant. A copy of the original materials will also be maintained by the OH Branch Manager in an open-case file. Upon completion of the case, the OH Branch Manager's copy may be consolidated with the original and/or destroyed.
- B. Organization of Evidence. The Investigator will arrange the case file with evidentiary materials on the right side of the folder and administrative materials on the left. Where practical, the evidence is to be organized in chronological order. Further, detailed guidance regarding proper case file organization may be found in Chapter 5, Report Writing and Case File Documentation.

III. Preliminary Investigation.

- A. When initially receiving the discrimination case, it is important to confirm that the complaint is valid and is covered under section 396-8(e), HRS. This initial review should confirm that the complaint is timely filed, that a *prima facie* allegation is present under section 396-8(e), HRS, and that the case has been properly docketed with notification to both parties.
- B. The Investigator may also check on prior or current discrimination or safety and health cases related to either the complainant or employer. Such information normally will be available from the IMIS or at the HIOSH Office. This enables the Investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand. Examples of information to be sought during the pre-investigation research phase are:
 - 1. Copies of safety and health complaints filed with HIOSH or other agencies.
 - 2. Safety and health enforcement actions, including inspection reports, which were

- recently taken against the employer.
3. Copies of the safety and health inspector's notes.
 4. Interviews and signed statement of the inspector.
 5. Information on previous discrimination complaints.
- C. Coordination with Other Agencies. If information received during the investigation indicates that the complainant has filed a concurrent charge or a safety and health complaint with another government agency (such as DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the Investigator may wish to contact such agency to determine the nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the discrimination complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

IV. The Field Investigation. Investigators may be assigned several complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

- A. Burden of Proof. In the course of any investigation it is important to bear in mind the elements of a violation and the burden of proof required of each party as if the case were being heard before a judge. It is on this basis that relevant and sufficient evidence should be identified and developed to reach an appropriate determination of the case. During all phases of the investigation, the Investigator must bear in mind and look for evidence dealing with the following elements of a violation:
1. Protected Activity. It must be established that the complainant engaged in activity protected by section 396-8(e), HRS.
 2. Employer Knowledge. The respondent must be shown to have been aware, or suspect, that the complainant engaged in protected activity.
 3. Adverse Action. The evidence must demonstrate that the complainant suffered some form of adverse action, including but not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire, or failure to promote.
 4. Nexus. A causal link between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited animosity) toward the protected activity or safety and health, proximity in time between the protected activity and the adverse action (timing), disparate treatment of the complainant compared to other similarly situated employees, false testimony or manufactured evidence, and pretextual defenses by the respondent, *etc.*
 5. Employer Defense. After the *prima facie* case is established, the respondent must, in order to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason, *e.g.*, poor work, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, OSHA or the complainant must show by a preponderance of the evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pretextual, *e.g.*, the non-safety related misconduct did not occur, other employees engaged in similar misconduct known to management were not similarly punished (disparate treatment), the misconduct played no role in the adverse action, "but for" the protected activity the adverse action would not have occurred, or the misconduct was minor in nature.

6. Dual Motive. If it is determined that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. The dual motive analysis may be based on either direct or circumstantial evidence of a link between an improper motive and the challenged employment decision. Direct evidence is evidence which does not require any deductions or inferences to establish the conclusion which is to be proven, such as statements by management that express hostility towards the complainant's protected activity. Circumstantial evidence is not based on direct evidence, but on other facts from which deductions are drawn which show indirectly the facts sought to be proved. An example of circumstantial evidence would be a respondent's statement which is shown to be false in a manner that supports the allegations of the complainant. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision despite the protected activity. As a general rule, to successfully develop the essential elements of the case, the Investigator will:
 - a. Determine the complainant's allegations,
 - b. Corroborate the allegations through witnesses and other evidence,
 - c. Determine the respondent's answer to the allegations and defenses,
 - d. Corroborate the respondent's response,
 - e. Determine the complainant's answer to the respondent's defense, and
 - f. Corroborate the complainant's answer to resolve all discrepancies.
- B. Initial Contact with Complainant. The initial contact with the complainant must be made as soon as possible after receipt of the case assignment. Contact must be made even if the Investigator's caseload is such that actual field investigation will be delayed.
1. Activity/Telephone Log. All telephone calls made during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the Investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. (A sample of the activity/telephone log is included at the end of this chapter.) If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the Investigator should document the content of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance, the telephone log may simply show the nature and date of the contact, the number called, and the comment "See Memo - Exhibit #."
 2. Early Dismissal. If the Investigator determines that the complainant does not have allegations which are appropriate for investigation under section 396-8(e), HRS, but may have a *prima facie* case under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance.
 3. Unable to Locate Complainant. In situations where an Investigator is having difficulty locating the complainant to initiate or continue the investigation, the following steps must be taken:
 - a. Telephone the complainant at different hours during normal work hours and

in the evening.

- b. Mail a certified, return-receipt-requested letter to the complainant's last known address requesting that the Investigator be contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, the OH Branch Manager may terminate the investigation and dismiss the complaint.

C. Field Investigation. If, after the initial telephone contact with the complainant, it appears that the complainant has presented a *prima facie* allegation, the Investigator will proceed with a field investigation. Personal interviews and on-site collection of documentary evidence will be conducted when practical. Investigations should be planned in such a manner to personally interview all appropriate witnesses during a single site visit. In limited circumstances, testimony and evidence may be obtained by telephone, mail, or electronically. If a conversation is recorded electronically, the Investigator must be a party to the conversation, and the witness must have given prior consent to the recording. This does not apply to other tape recordings supplied by the complainant or witnesses; however, all electronically recorded interviews or other voice recordings must be transcribed if they are to be used as evidence.

D. Complainant Interview. The Investigator will arrange to meet with the complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations. Such a record is highly desirable and useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in testimony, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present at any time.

1. If, at this point or at any later stage in the investigation, it can be conclusively shown that a *prima facie* case cannot be developed, the investigation will be terminated.
2. The complainant's side of the investigation must be developed as thoroughly as possible. When writing the complainant's statement, it is usually practical to organize the testimony in a chronological order, outlining pertinent data and events from the time of the employee's hiring through the date of the adverse action, as well as subsequent developments. While much care should be taken to cover the essential elements of a discrimination case as outlined above, the complainant should be encouraged to talk freely about his/her concerns and experiences on the job, as important information may be revealed that might be missed in a generic "investigative outline" style of interview. An interview is an interactive process of questions and answers. A complainant or witness should never be instructed to submit a statement or fill out a questionnaire without engaging in this process.
3. The complainant should be encouraged to identify as many witnesses as possible, including names, home addresses, and phone numbers if available, as well as a summary of specifically what each witness might be able to testify to in support of the complainant's allegations.
4. The complainant must be requested to furnish all documentation in his/her

possession relevant to the case. Such documentation might include:

- a. Copies of any discharge notices, reprimands, warnings or personnel actions,
- b. Performance appraisals,
- c. Earnings and benefits statements
- d. Grievances,
- e. Unemployment benefits claims and determinations,
- f. Job position descriptions,
- g. Company employee and policy handbooks,
- h. Copies of any charges or claims filed with other agencies or personal attorneys,
- i. Medical records, or
- j. Collective bargaining agreements.

5. It should be ascertained during the interview what restitution the complainant is seeking. If terminated or laid off by the respondent, the complainant should be advised of his/her obligation to search for work and to keep records of interim earnings. Failure to do so might result in a reduction of any back pay to which the complainant might be entitled in the event of future settlement or litigation, should the case be found meritorious. The complainant should be advised that the respondent's back pay liability ordinarily ceases when the complainant refuses a *bona fide*, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.
6. If, in unusual circumstances, the complainant is not personally interviewed and his/her statement is taken telephonically, a detailed Memo to File will be prepared relating the complainant's testimony. If necessary, this information may be transferred to an official statement form, and mailed to the complainant with instructions to review the document carefully, make any necessary corrections or additions, sign and return.

E. Contact Respondent. Oftentimes, after receiving the notification letter that a complaint has been filed, the respondent may call the Investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the telephone log, and if pertinent information is conveyed during this conversation, the Investigator should document such in the telephone log or in a Memo to File.

1. In many cases following receipt of the OH Branch Manager's notification letter, respondent will forward a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. Assertions made in the respondent's position statement do not constitute evidence, and generally, the Investigator will still need to contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test respondent's stated defense.
2. If the respondent requests time to consult legal counsel, the Investigator will advise that future contact in the matter will be through such representative. The

Designation of Representative form should be completed by counsel to document his/her involvement.

3. In the absence of a signed Designation of Representative, the Investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the Investigator will contact the person who signed the letter.
4. The Investigator should interview all company officials who have known direct involvement in the case and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually to obtain the best testimony.
 - a. In this regard, if the respondent has designated an attorney to represent the company, interviews with management and supervisory officials should ordinarily be scheduled through the attorney, who may be present during any interviews of the management and supervisory witnesses.
 - b. Respondent's attorney does not, however, have the right to be present, and should not be present, during interviews of non-management or non-supervisory employees.
 - c. Any respondent or other witness may, of course, have a personal representative or attorney present at any time.
 - d. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to the complainant and does not wish the company to know he or she is speaking with the Investigator. In such event, an interview should ordinarily be scheduled away from the premises.
5. While at the respondent's establishment, the Investigator should make every effort to obtain copies of, or at least review and make notes on, all pertinent data and documentary evidence which respondent offers and which the Investigator construes as being relevant to the case.
6. If at any time during the initial (or subsequent) meeting with respondent, management officials, or counsel, respondent suggests the possibility of an early resolution to the matter, the Investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.)
7. If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under section 396-8(e), HRS. Subpoenas should be obtained following procedures established by the Administrator.
8. If the respondent fails to cooperate or refuses to respond, the Investigator will evaluate the case and make a determination based on the information gathered during the investigation.

- F. Early Joint Review with the DAG. If in the early stages of the investigation of cases under section 396-8(e), HRS, (where preliminary reinstatement may be ordered), and in other cases where HIOSH may recommend that DAG participate in the case, where the Investigator and the OH Branch Manager believe there is evidence that the complainant's allegation has merit and may not be easily settled, the DAG should be contacted and briefed on the case.
1. Early DAG involvement will help direct the course of the investigation, and ensure that proper documentation is gathered to help the DAG in a potential appeal.
 2. With DAG assurance that the case will likely go forward, the Investigator may take a stronger position with the respondent during investigative meetings or the closing conference and negotiate a better settlement.
 3. Early discussion may resolve the differences and prevent needless DAG review of the case. This may also obviate the need for further investigative efforts if the case is considered inappropriate, thus precluding unnecessary expenditure of government resources and a speedier conclusion of the investigation.
- G. Further Interviews and Documentation. It is the Investigator's responsibility to fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources.
1. The Investigator must attempt to obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be "rehearsed," intimidated, or reluctant to speak in the workplace, the Investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have an attorney or other personal representative present at any time.
 2. In the event that a signed statement cannot be obtained from a witness, interview notes should be taken and a memorandum to the file subsequently prepared by the Investigator setting forth all pertinent information obtained verbally from the witness.
 3. The Investigator will attempt to obtain copies of appropriate records and other pertinent documentary materials as required. If this is not possible, the Investigator will review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceedings.
 4. In cases where the complainant is covered by a collective bargaining agreement, the Investigator should interview the appropriate union officials, and obtain

copies of grievance proceedings or arbitration decisions specifically related to the discrimination case in question.

5. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed.
- H. Resolve Discrepancies. After completing the respondent's side of the investigation, the Investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.
- I. Analysis. After having gathered all relevant evidence available, the Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above.
- J. Closing Conferences. Upon completion of the field investigation, and after discussion of the case with the OH Branch Manager and SI, as necessary, the Investigator will conduct a closing conference with the complainant. This conference may be conducted with the complainant in person or by telephone. The Investigator should bear in mind that a thorough, tactful closing conference is considered a very important and valuable step to achieve a successful conclusion to the investigation. Assuring the complainant that his or her concerns have been fully explored and the investigative findings impartially evaluated will minimize the likelihood of appeals or objections, even though the complainant may not be totally satisfied or in agreement with the determination.
1. During the conference, the Investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
 2. It is unnecessary and improper to reveal the identity of witnesses interviewed. If the complainant feels that certain witnesses should have been interviewed but were not, the Investigator will explain why the witnesses may not have been interviewed.
 3. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the Investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
 4. During the closing conference, the Investigator must inform the complainant of his/her rights to appeal, as well as the time limitation for filing the appeal.
 5. The Investigator should also advise the complainant that the decision at this stage is preliminary and subject to review by higher management and/or the

DAG.

6. The closing conference will be documented in the case file either by an entry in the telephone log or a separate Memo to File. The closing conference will also be documented in the Final Investigation Report.

K. Document File. With respect to any and all activities associated with the investigation of a case, Investigators must continually bear in mind the importance of documenting the file to support their findings. Time spent carefully taking notes and writing memoranda to file is considered productive time and can save hours, days, and dollars later when memories fade and issues become unclear. To aid clarity, documentation should be arranged chronologically where feasible.

Sample Documents

from

Chapter Three

Discrimination Tracking Log	3-9
Investigation Activity Log	3-10
Sample Statement form.....	3-11
Memorandum to File	3-14

DISCRIMINATION TRACKING LOG

Complainant Name: _____ Complaint Number: _____

Respondent Name: _____ Inspection Number: _____

STEP	ACTION TAKEN	DATE/TIME	INITIAL	COMMENTS
(1)	Date signed complaint received (Date stamped by Administrator's Secretary)			
(2)	Date case reviewed by screening officer and questionnaire sent to Complainant			
(3)	Complaint screened for:			
	<input type="checkbox"/> full-field			
	<input type="checkbox"/> partial field			
	<input type="checkbox"/> dismissed			
(4)	Date file sent to clerical pool for preparation of letter(s) to Complainant and Respondent (Respondent letter includes "Notice of Representation")			
(5)	Date letter(s) returned for signature			
(6)	Date letter(s) sent to clerical pool for mailing			
(7)	Screening officer: Data-enters case (NCR); and			
	Logs info. (Discrimination Log in public file)			
(8)	Case file prepared by CSU sent to DSO for investigator briefing			
(9)	Investigator briefed			
(10)	Investigator develops pre-opening settlement agreement			
(11)	Opening conference (Settlement offered)			
(12)	Meeting with DSO and Branch Manager for progress report (2 weeks after investigator briefed)			
(13)	Case to DSO (within 60 days of receiving complaint)			
(14)	Date file sent to clerical pool for preparation of letter(s) to Complainant/Respondent with outcome			
(15)	Date letter(s) returned for signature			
(16)	Date letter(s) sent to clerical pool for mailing			
(17)	Date complaint closed (within 90 days)			
(18)	Screening officer: Updates Data-entry (NCR); and			
	Updates Log info. (Discrimination Log in public file)			

Mark box if Witness Statement includes additional pages.

I HAVE READ AND HAD A CHANCE TO CORRECT THIS ENTIRE STATEMENT, WHICH IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT CHAPTER 396, HAWAII REVISED STATUTES, MAKES IT A CRIMINAL OFFENSE TO KNOWINGLY MAKE FALSE STATEMENTS OR REPRESENTATIONS IN THIS STATEMENT.

SIGNED, this _____ day of _____, _____.
(day no.) (month) (year)

(print name)

(signature)

COMPLETE ONLY IF NON-MANAGEMENT EMPLOYEE

- MY IDENTITY MAY BE DISCLOSED.
- MY IDENTITY MAY BE DISCLOSED ONLY IF A CONTEST OR APPEAL IS FILED.
- MY IDENTITY MAY NOT BE DISCLOSED.

(signature)

(date)

Chapter 4

Case Disposition

A successful investigation is one that reveals the truth of the situation in a timely manner and correctly applies the law to arrive at the proper case disposition. This should result in appropriate remedy to employees whose rights were violated and no remedy to those whose rights were not violated.

I. Scope. This chapter sets forth the policies, procedures and format for writing the Final Investigation Report (FIR). It includes procedures for arriving at a determination on the merits of a discrimination case; policies regarding withdrawal, settlement, dismissal, appeals, adequacy of remedies; and agency tracking procedures for timely completion of cases.

II. Preparation.

- A. Investigator Reviews the File. After completing the investigation, the Investigator must thoroughly review the file and its contents to collate and organize all pertinent data in preparation for writing the Final Investigation Report (FIR). When appropriate, the Investigator may wish to discuss the case with the OH Branch Manager prior to writing the FIR.
- B. Investigator and OH Branch Manager Discuss the Case. Once the Investigator has thoroughly reviewed the file and compiled all pertinent data, the OH Branch Manager may be contacted to discuss the facts and merits of the case prior to writing the FIR. The OH Branch Manager can advise the Investigator of any issues and, as appropriate, assist in reaching a decision on the merits or decide whether additional investigation is necessary.

III. Final Investigation Report. The Investigator will report the results of the investigation by means of the Final Investigation Report following the policies and format described in detail in Chapter 5 of this Manual.

IV. Case Review and Recommendation by the OH Branch Manager.

- A. Review. Upon receipt of the completed investigation case file from the Investigator, the OH Branch Manager will review the file to ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case. The OH Branch Manager will review the case file for consistency with legal precedents and policy impact. Such review will be completed as soon as practical after receipt of the file.
- B. Recommendation. If the OH Branch Manager concurs with the analysis and recommendation of the Investigator, the concurrence will be documented by memorandum from the OH Branch Manager to the Administrator or a

concurrence block at the end of the FIR. The OH Branch Manager or the investigator will then prepare the appropriate determination letters for the Administrator's signature.

1. Withdrawal. For recommendations to approve withdrawal, the OH Branch Manager will approve by signature on the withdrawal form. In cases where the complainant has failed to return a signed withdrawal form, the disposition letter to the complainant must clearly indicate that the disposition of the case is based on the complainant's verbal request for withdrawal. (See sample letters at the end of this chapter.)
2. Dismissal. For recommendations to dismiss, the OH Branch Manager will prepare letters of dismissal to the complainant with a copy to the respondent. The letters must include the necessary information regarding the parties' rights to objection or to appeal the findings.
3. Settlement. For recommendations to approve settlement, the OH Branch Manager will approve by signature on the Settlement Agreement. The OH Branch Manager will also prepare for the Administrator's signature appropriate letters to the complainant and respondent forwarding copies of the settlement agreement, the Notice to Employees, the back pay check, etc. (Settlement procedures and settlement negotiations are discussed in detail in Chapter 6.)
4. Deferral. In HIOSH cases, for recommendations to defer to another agency decision or private settlement, the OH Branch Manager will draft letters of deferral to the complainant for the Administrator's signature, sending a copy to the respondent. HIOSH may defer to the determination of another agency. (See sample deferral letter at the end of this chapter.)
5. Merit Finding. For recommendations of merit in HIOSH discrimination cases, the OH Branch Manager will prepare a letter and order to the respondent with a copy to the complainant. Please refer to the appropriate chapters of this manual for details regarding the proper procedures under the Law that provides for findings and orders.
6. Further Investigation Warranted. If, for any reason, the OH Branch Manager does not concur with the Investigator's analysis and recommendation or finds that additional investigation is warranted, the OH Branch Manager will return the file for follow-up work.

C. Legal Requirements. The OH Branch Manager should confer with the DAG or SI for advice or consultation at this point, if necessary, or at other appropriate times during the conduct of the investigation to ensure that legal requirements are met. A thorough understanding of the laws, regulations, policies, and due process rights is critical to the successful conclusion of a case.

V. Administrator's Determination. Upon receipt of the case file from the OH Branch Manager, the Administrator or delegate will review the recommendations and the file and sign the appropriate letter of determination as prepared by the investigator or return the file for further clarification or additional investigation as appropriate. All letters of determination to both the complainant and respondent must be sent by certified mail, return receipt requested.

VI. Appeals.

A. Policy. Section 396-11 provides both complainant and respondent the right to appeal

the final merit or non-merit case determination. Investigators shall ensure that both parties are informed of, and understand, their right to appeal the final determination within 20 calendar days of receipt of the order.

B. Appeal Procedures. Normally, complainants appeal non-merit determinations and respondents appeal merit determinations. The appeal policies and procedures for both complainant and respondent are identical.

C. Timeliness. Any appeal of a merit or non-merit determination must be filed in writing to the Director within 20 calendar days following the receipt of the determination notification to the complainant or respondent.

1. The 20 calendar day period begins with the first day after the receipt date noted on the Certified mail Return Receipt form provided by the U. S. Postal Service.
2. Appeals filed beyond the 20 calendar days filing period will be forwarded to the HLRB for determination of timeliness.

D. Valid Appeals. Appeals that are filed in a timely manner by complainant or respondent will be forwarded to the HLRB. A copy of the case file will be forwarded to the deputy attorney general. A letter to HLRB, AG, and the Employer acknowledge that that the contested case is being transmitted.

Sample Documents

from

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Sample Complainant Withdrawal Request under Section 396-8(e) Complaint

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
 830 PUNCHBOWL STREET, ROOM 425
 HONOLULU, HAWAII 96813
www.hawaii.gov/labor
 Phone: (808) 586-9116 / Fax: (808) 586-9104
 Email: dllr.hiosh@hawaii.gov

Discrimination Complainant Withdrawal Request

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a withdrawal may be registered with the Hawaii Occupational Safety and Health Division.

The undersigned complainant wishes to withdraw the complaint in case # _____.

 Respondent Name

This withdrawal request is submitted voluntarily by the undersigned.

I understand that I have the right to appeal a determination by the Hawaii Occupational Safety and Health Division, and I have waived that right.

 Initial of the Complainant

Withdrawal Request Received by:	Complainant's Signature
Signature	Type or print Complainant's name
Title	
Withdrawal Request Approved by:	
Signature	
Title	
Date	

Sample Complainant Withdrawal Confirmation Letter under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dir.hiosh@hawaii.gov

Date

Complainant's Name
Street Address
City, State ZIP

Re: Respondent/Complainant/Case No. ##-###

Dear Complainant:

Your request to withdraw your complaint in the above-captioned matter has been approved. With this withdrawal, the case in this matter is closed.

If at any time in the future you believe this office could be of assistance regarding possible discriminatory action taken against you by an employer because of the exercise of rights guaranteed to employees under chapter 396-8(e), Hawaii Revised Statutes, of the Occupational Safety and Health Law, please feel free to contact this office by mail or telephone.

Sincerely,

Manager
Occupational Health Branch

cc: Respondent
Attorney



**Sample Respondent Withdrawal Confirmation Letter under Section 396-8(e)
Complaint**

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR
COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dliir.hiosh@hawaii.gov

[date]

Mr. President ABC
Company Street
Address City, State
ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. President:

The complaint in the above-captioned matter has been withdrawn. With this withdrawal, the case in this matter is closed.

If at any time you have any questions or require any information regarding employee rights and employer responsibilities under Section 396-8(e) of the Hawaii Occupational Safety and Health Law, please feel free to contact this office by mail or telephone.

Sincerely,

Manager

Occupational Health Branch

cc: Attorney



Sample Complainant Dismissal Letter under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dlir.hiosh@hawaii.gov

Date

Mr. U. R. Complainant Street Address City, State ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. Complainant:

Your complaint of discrimination under Section 396-8(e) of the Hawaii Occupational Safety and Health Law, has been investigated and the results thereof carefully considered.

As a result of the investigation, it appears that the burden of establishing that you were discriminated against in violation of the above-cited section of the law cannot be sustained. For the reason given you by the investigator on the occasion of your closing conference, the evidence developed during the investigation was not sufficient to support a finding of a violation. Accordingly, we are dismissing your complaint.

Any appeal of this determination must be filed by letter with:

Department of labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 Punchbowl Street, Room 425
Honolulu, HI 96813

If you feel that the investigation was not conducted in accordance with established procedures, you may file a Complaint About State Plan Administration (CASPA) with:

San Francisco Federal Building
OSHA - Regional Administrator
90 7th Street, Suite 18-100
San Francisco, CA 94103

Mr. Complainant

Page 2

This CASPA must be received at the U.S. Department of Labor in Region 9, within 15 days from your receipt of this letter.

Sincerely,

Manager

Occupational Health Branch
cc: Attorney



Sample Respondent Dismissal Letter under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dlir.hiosh@hawaii.gov

[date]

Mr. President ABC
Company Street
Address City, State
ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. President:

The complaint in the above-captioned matter has been dismissed by this office. However, the complainant is afforded the opportunity to file an appeal of this dismissal with the Department of Labor and Industrial Relations - HIOSH, within 15 days of the dismissal date. In the event that no appeal action is taken by the complainant, this case will be considered closed.

If at any time you have any questions or require any information regarding employee rights and employer responsibilities under Section 396-8(e), HRS of the Hawaii Occupational Safety and Health Law, please feel free to contact this office by mail or telephone.

Sincerely,

Name Administrator

cc: Attorney



Sample Notice of Appearance Order under Section 396-8(e) Complaint

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax: (808) 586-9104

Email: dlir.hiosh@hawaii.gov

Notice of Appearance

Case # _____

The undersigned hereby enters his appearance as representative of:

in the above-captioned matter.

Signature of Representative
(Please sign in ink)

(Typed or Printed Name)

Title

Date

Address

Telephone Number (include area code)

Sample Subpoena of Records Order under Section 396-8(e) Complaint

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

OCCUPATIONAL SAFETY AND HEALTH DIVISION

STATE OF HAWAII

In the Matter of

Occupational Safety and Health

Investigation Re: **Establishment Name**

Inspection No.: **case #**

SUBPOENA DUCES TECUM
EXHIBIT "A": RETURN OF SERVICE

SUBPOENA DUCES TECUM

TO: **CUSTODIAN OF RECORDS**
Establishment Name
Address
City, State Zip

YOU ARE COMMANDED to appear personally before **Investigator(s) Name**, **Job Title**, of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, at the time and place indicated below to testify under penalty of perjury regarding an investigation concerning **Establishment Name** and to turn over for inspection and copying all records listed in Exhibit "A" in your care, custody and/or control:

DATE: **Day & Date of Appearance**
TIME: **Time**
PLACE: **Address Include City, State Zip**

DATED: Honolulu, Hawaii, **Date of Subpoena**

NELSON B. BEFITEL
Director, Department of Labor and
Industrial Relations

EXHIBIT A

Exhibit #

Description

Sample Return of Service under Section 396-8(e), complaints

RETURN OF SERVICE

I HEREBY CERTIFY that this subpoena was duly served on the person named above by delivering a copy to that person on _____.
Together with a witness fee for a day's attendance and the mileage allowed by law at the following location:
_____.

Investigator's Name
Job Title
Hawaii Occupational Safety
And Health Division

Signature (witness)

Print Name

Address , if different than listed

Date

Time

Sample Not in HIOSH Jurisdiction Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dir.hiosh@hawaii.gov

{date}

Complainant's name
Address

Dear Complainant:

This is to acknowledge receipt of your complaint of Discrimination under Section 396-8(e) of the Hawaii Occupational Safety and Health Law, Hawaii Revised Statutes. After careful review of your complaint, we are informing you that your complaint of racial discrimination is not in the jurisdiction of this office and are therefore, closing your complaint.

However, this office has checked with the Hawaii Civil Rights Commission which has jurisdiction over this type of complaint. Unfortunately, their statutory limitation for filing a complaint is 180 days or 6 months and your complaint filed with our office has already passed that statute of limitation. The only option you now have is to file with the United States Equal Employment Opportunity Commission (EEOC). Their Statute of limitation allows 300 days in which to file a complaint. As your deadline of 300 days is approaching; I am enclosing a set of their forms for your convenience. Please file your complaint with the EEOC office at 300 Ala Moana Boulevard, Room 7-127, Honolulu, HI 96850-0051.

As for the safety and health related discrimination portion of your complaint. You have filed your complaint beyond the statute of limitation of filing within 60 sixty days of the discriminatory event. We are, therefore, closing your complaint due to untimely filing.

We appreciate you bringing this complaint to our attention and thank you for your concern to ensure a safe work environment. Section 396-8(e), HRS, provides that employees who engage in protected activity, which may include filing complaints about safety and health or even inquiring about a company's safety and health policies, be protected under the Statute. In the future, if you encounter discrimination covered under Section 396-8(e), please do not hesitate to file a complaint with our office.

Sincerely,

Manager
Occupational Health Branch

Sample Untimely Filed Notification Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dir.hiosh@hawaii.gov

Date

Complainant's Name
Address

Dear Complainant:

We received your letter dated _____ regarding the discrimination complaint you filed with the Department of Labor and Industrial Relations' Hawaii Occupational Safety and Health Division. The discrimination complaint alleges that your employer, Respondent, violated Chapter 396-8(e), Hawaii Revised Statutes (HRS). You were <enter Adverse Action> for <enter reason>.

The statutory limitation for filing a discriminatory complaint is within 60 days of the discriminatory event. According to our records, the discrimination complaint made against your employer occurred ____ days beyond the statutory limitation. Therefore, the HIOSH has dismissed your case due to an untimely filing.

We appreciate you bringing this complaint to our attention and thank you for your concern to ensure a safe work environment. Section 396-8(e), HRS, provides that employees who engage in protected activity, which may include filing complaints about safety and health, or, inquiring about company's safety and health policies, be protected under the Statute. Should you encounter any discrimination in the future as covered under Section 396-8(e), please do not hesitate to file a complaint with our office.

Sincerely,

Manager
Occupational Health Branch



Sample Complainat/Respondent Appeals Notification Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dijr.hiosh@hawaii.gov

[date]

{Name of Employee/Employer or Representative, Title}
{Company's Name}
{Address}

Dear: RE: NOTICE OF CONTEST
Discrimination Complaint

We are sending your contested case Respondent vs Complainant to the Hawaii Labor Relations Board and the Office of the Attorney General. Please be advised that once your letter of contest is received, the contested items become the jurisdiction of the Hawaii Labor Relations Board. You will be receiving notices from the Hawaii Labor Relations Board regarding pre-trial and hearing dates or any information relating to your case. Please call the Hawaii Labor Relations Board at 586-8610 for any questions pertaining to these notices.

Any questions pertaining to the contested items should be directed to the Office of the Attorney General at 586-1450. If you have questions that are not related to the contest, please call {586-9110/586-9090}.

In accordance with Section 12-51-16(c) and (d), Hawaii Administrative Rules (HAR), you are required to notify your employees of this contest by posting in a manner similar to the Citation and Notification of Penalty.

Sincerely,

Administrator

c: Hawaii Labor Relations Board
Department of the Attorney General



**Sample Appeals Notification Letter to Attorney General's Office under
Section 396-8(e) Complaint**

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dli.hiosh@hawaii.gov

[date]

TO: Frances Lum, Supervising Deputy Attorney General
Department of the Attorney General, Labor Division

FROM: Nelson B. Befitel, Director
Department of Labor and Industrial Relations
for the Hawaii Occupational Safety and Health Division

SUBJECT: Notice of Contest
Discrimination Complaint

Respondent vs Complainant/ ##-###

Transmitted herewith are documents in connection with the above contested case. The employer is contesting the entire decision, any finding of discrimination, the discrimination and order of appropriate relief, penalty and determined payment in question and/or any other matter related to the Complainant.

The following {address/addresses} {is/are} provided for your information and use:

Respondent's name
Address(es)

Attorney's Name
Address(es)

c: ATS/hlm

Enclosures



Sample Notification Letter to HLRB under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dir.hiosh@hawaii.gov

[date]

TO: Brian Nakamura, Chairperson
Hawaii Labor Relations Board

FROM: Nelson B. Befitel, Director
Department of Labor and Industrial Relations
for the Hawaii Occupational Safety and Health Division

SUBJECT: Notice of Contest
Discrimination

Respondent vs Complainant/ ##-###

Transmitted herewith are documents in connection with the above contested case. The employer is contesting the entire decision, any finding of discrimination, the discrimination and order of appropriate relief, penalty and determined payment in question and/or any other matter related to the Complainant.

The following {address/addresses} {is/are} provided for your information and use:

Respondent's name
Address(es)

Attorney's Name
Address(es)

Enclosures

c: Department of the Attorney General



Sample Dismissal Letter to Complainant under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dlir.hiosh@hawaii.gov

[date]

Complainant's Name
Address

Dear Complainant:

We received your letter on <Date> regarding the discrimination complaint you filed with the Department of Labor and Industrial Relations' Hawaii Occupational Safety and Health Division (HIOSH). The complaint alleges that your employer, Respondent, violated Chapter 396-8(e) Hawaii Revised Statutes (HRS), and retaliated against you by terminating you for <reasons>.

The HIOSH's Occupational Health Branch has investigated your complaint of discrimination under Section 396-8(e) of the Hawaii Occupational Safety and Health Law, Hawaii Revised Statutes. After careful review and investigation of your complaint, there is insufficient evidence to make a determination of discrimination.

In determining whether or not a prima facie case exists, four (4) elements must be considered: (1) protected activity; (2) employer knowledge; (3) adverse action; and, (4) a causal link between all the elements. All of the elements must be met to constitute a violation of Section 396-8(e), HRS.

Information collected during our investigation, it has been determined that your complaint does not meet the requirements of a prima facie case. The investigation found that you were terminated for abandoned your job.

Based on our findings, we are unable to establish that you were discriminated against and that there was a violation of Section 396-8(e), Hawaii Revised Statutes. The employer has met his burden of that any adverse action was based on non-discriminatory reasons. We are, therefore, closing your complaint. You may file an appeal of this determination by original letter no later than twenty (20) calendar days from receipt of this letter. Your appeal may be filed with:



Department of labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 Punchbowl Street, Room 425
Honolulu, HI 96813

If you feel that the investigation was not conducted in accordance with established procedures, you may file a Complaint About State Plan Administration (CASPA) with:

San Francisco Federal Building
OSHA - Regional Administrator
90 7th Street, Suite 18-100
San Francisco, CA 94103

Sincerely,

Manager
Occupational Health Branch



Sample Finding of Discrimination Letter to Respondent under Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dir.hiosh@hawaii.gov

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Respondent or Attorney
Address

Dear Respondent/Attorney:

SUBJECT: Respondent/Complainant/Case #-###

1. FINDINGS OF DISCRIMINATION INVESTIGATION

Based on a comprehensive investigation that has been conducted, the Hawaii Occupational Safety and Health Division (HIOSH) has determined that the preponderance of the evidence supports a finding of violation of section 396-8 (e), Hawaii Revised Statutes, which occurred because of participation in a safety and health protected activity by <Name of Complainant>, the complainant. <Complainant> alleged that he/she was discriminated against when his/her employment was terminated on Date, after he/she reported <Protected Activity>.

The following evidence supports findings of a violation that <Complainant> was discriminated against when his/her employment was terminated.

- a. <Complainant> engaged in a protected activity when he/she complained to Management.....
- b. Employer was fully aware of the situation because <Name of management> received the complaint.
- c. Adverse action occurred when <Name of Complainant> was terminated.



Nexus between the protected activities and the discriminated activity was established by < actions took by management >.

It is further found that the employer's offered reason for termination, <Reason for termination>, was a pretext in that, was terminated on <Date>.

2. APPROPRIATE RELIEF

<Company Name> is ordered to provide relief to <Complainant> by:

- a. Restitution: <complainant> shall receive back pay at the rate of \$xxx.xx per month (less normal payroll deductions), from <pay Period> until full restitution is made. Full back pay restitution is due and payable within twenty (20) calendar days of receipt of this order.
- b. Posting the enclosed "Notice to Employees" for a period of sixty (60) days in a conspicuous place in the work area for convenient access and review by <Company Name> employees employed in Hawaii.
- c. Clearing <Complainant's> personnel and other company records of any unfavorable references or entries related to this cited section 8(e) violation.
- d. Offering <Complainant> his/her job back with full seniority, pay, and benefits by <Date>, as if he/she was continually employed by the company.

3. PENALTY

The proposed penalty for this alleged violation of section 396-8(e), Hawaii Revised Statutes, is \$X,XXX.XX. This penalty is due within twenty (20) calendar days from receipt of this order, unless contested (see #6, Employer Rights).

4. PAYMENT INFORMATION

Please make your check or money order for the restitution payable to "<Complainant>" in the amount of \$X,XXX.XX (less regular payroll deductions).

Please make your check or money order for the \$X,XXX.XX penalty payable to "Director of Budget and Finance."

Checks should be mailed to the Hawaii Occupational Safety and Health Division, 830 Punchbowl Street, Room 425, Honolulu, Hawaii 96813.



5. EXPLANATION OF RESTITUTION (See Appendix)

6. EMPLOYER RIGHTS

An informal conference may be requested to discuss any questions or misunderstandings relative to the investigation, citation, and/or penalty. The informal conference will NOT extend or stay the twenty (20) day period to file a notice of appeal.

You may appeal the order, citation and/or penalty by notifying the Administrator in writing within twenty (20) calendar days after receiving this order. If you appeal, you must file the notice of appeal with:

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 Punchbowl Street, Room 425
Honolulu, Hawaii 96813

If this order is not appealed, the order, citation and penalty becomes final and unappealable after twenty (20) days.

Sincerely,

Administrator

Enclosures

c: Company Name/Attorney
Complainant

Certified No.: 7002 2030 0001 3718 6303



APPENDIX

EXPLANATION OF RESTITUTION

As to restitution, back pay has been determined from the information that was made available by <Complainant> (copies of pay stubs). Back pay has been computed on the following basis:

Basic salary per month = \$XXX.XX

Back pay for regular time pay for period <Date> to <Date> = # months

$$\text{\$XXX.XX} \times \# = \text{\$XXX.XX}$$

Back pay for regular time pay for period <Date> to <Date> = # workdays

$$\text{\$XXX.XX} / \# \text{ workdays per month} = \$ \text{XXX.XX} / \text{day}$$

Rate of pay per day \$XXX.XX x # = \$XXXX.XX

Unadjusted back pay for pay period <Date> to <Date>
 $\text{\$XXX.XX} + \text{\$XXX.XX} = \text{\$XXXX.XX}$ (less regular payroll deductions)



Chapter 5

Report Writing and Case File Documentation

Even the most thorough of investigations is of little value until the results are effectively communicated to others.

- I. **Scope.** This chapter sets forth the policies, procedures, and format for writing the Final Investigation Report (FIR) and for properly organizing and documenting the investigative case file. Composition of Director's Findings and Orders is also addressed.
- II. **Screened Complaints.** In cases which are not docketed after the initial screening, the file arrangement of materials as outlined below need not be followed. Rather, a memorandum to file will be prepared documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation. A letter to the complainant will be prepared for the Administrator's signature confirming the administrative closure of the complaint.
- III. **Case File Organization.**
 - A. As part of the case docketing process, the OH Branch Manager will prepare an original case file for assignment to the Investigator and a copy of the file, which will be placed in an "open cases" file as backup to the original.
 - B. Upon assignment, the Investigator normally receives a standard case file containing the OSHA-82 or 87, screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file will be organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.
 1. Evidentiary material normally will be arranged as follows:
 2. Investigator's rough notes
 3. Telephone log
 4. Original complaint (Form OSHA-82, OSHA-87, or letter)
 5. Documents from HIOSH or other agency enforcement files
 6. Complainant's signed statement
 7. Remaining evidence (statements, records, etc., in logical sequence)
 - C. Separation of Materials. Evidentiary materials will be separated by means of blank paper dividers with a number index tab at the bottom. Tabs will be numbered consecutively using Arabic numbers from left to right starting at the bottom. Only the items of evidence contained on the right side of the file folder need be tabbed. A Table of Contents identifying all the evidentiary material by exhibit must be placed on top to aid review of the case file.

- D. Administrative materials will be secured on the left side of the case file, and may be placed in the file as they are generated or received.

IV. Final Investigation Report (FIR).

- A. Effective Communication. One of the primary skills required of a whistleblower investigator is the ability to present the investigative findings in a clear and succinct manner that effectively communicates the results of the investigation to the reader of the report. The general format of the FIR will be as set forth below. It shall be a memorandum addressed to the OH Branch Manager (See sample FIR at the end of this chapter.)
- B. FIR Format. As shown in the sample, format for the FIR is as follows:
1. Date Complaint Filed. Indicate the actual date that the complaint was filed.
 2. Complainant. Include full name, mailing and street address, telephone number, fax number, and e-mail address of the complainant.
 3. Represented by. Identify the complainant's attorney or other designated representative, mailing address, telephone number, fax number, and e-mail address, if applicable.
 4. Respondent. Include the full name, mailing and street address, telephone number, fax number, and e-mail address of the respondent.
 5. Represented by. Identify the respondent's attorney or other designated representative. Include name, title, mailing address, telephone number, fax number, and e-mail address, if applicable.
 6. Allegation. Give a brief account of the complainant's allegations; e.g., "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."
 7. Defense. Give a brief account of the respondent's defense; e.g., "Respondent claims the complainant was discharged for excessive absenteeism."
 8. Coverage Data. Give a brief statement of the basis for coverage and a basic description of the company to include location of main offices, nature of primary business, and how interstate commerce is affected.
 9. List of Witnesses. List name, occupation, mailing and street address and telephone number of all witnesses interviewed, and list other known potential witnesses who were not interviewed.
 10. Investigative Findings. The Investigative Findings section should begin with descriptive background information on the work site and history of OSHA safety and health activity, if any, and flow from there through the events relating to the alleged discrimination. The findings should be written in a narrative, "story telling" format. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary). References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned. Please see the example FIR at the end of this chapter.
 11. Analysis/Conclusions. Evaluate the facts presented in the Investigative Findings as they relate to the four elements of a violation. Questions of

credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented. A discussion of the strengths and weaknesses of the case *vis-a-vis* respondent's possible defense should also be presented, as appropriate. Discuss the adequacy of the facts, legal principles involved.

12. Closing Conferences. Include the date of the conference, where it took place, the reasons given for a positive or negative finding, a description of the party's reactions to the findings, and any attempt by the party to offer any new evidence or witnesses. If the case is recommended for dismissal, mention that appeal rights and objection procedures were explained. If the case was settled, a description of the settlement should be presented in lieu of the closing conference.
13. Recommendation. Give a short paragraph on the Investigator's recommendations for disposition of the case.

Example of a typical Case File

Case File Organization		
Left Side Administrative Materials	Tab Number	Right Side Evidentiary Materials
Assignment Memorandum	1	Rough Notes
Complainant Notification	2	Telephone/Activity Log
Respondent Notification	3	Letter of Complaint
Designation of Representative	4	OSHA-7
Letter to Attorney	5	Complainant's Statement
Determination Letter	6	CSHO Statement
Appeal Letter	7	Witness Statement
Appeal Determination	8	Witness Statement
	9	Attendance Record
	10	Supervisor's Statement
	11	Closing Conference Memo
	12	Final Investigation Report
		Table of Contents

Sample Documents from Chapter Five

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Sample Case file organizing order

Table of Contents

A Left Side of File

1. Copies of correspondence to the complainant and the respondent.
2. Other correspondence.
3. Transmittal memorandum

B. Right side of File

1. **I** Final Investigative Report
- II** Closing Conference Memo
- III** Evidentiary Materials
 - A. Respondent's Statement
 1. Corporate Statement
 2. Statement 1
 3. Statement 2
 - B. Complainant's Statement
 - C. Witnesses's Statement
 1. Statement 1
 2. Statement 2
 3. Statement 3
- IV** Enforcement Activity
- V** Letter of Complaint
- VI** Telephone Log
- VII** Investigator's Rough Notes

Sample Final Investigation Report I

[date]

MEMORANDUM FOR: Name
Supervisor

FROM: I.M. Investigator Discrimination Investigator

SUBJECT: ABC Company/John Doe/Case No. 1501-07001

FINAL INVESTIGATION REPORT

Date Filed: January 13, 2004, with HIOSH.

Complainant: John Doe Street City, State, Zip Telephone: (123) 456-7890

Represented By: NONE

Respondent: ABC Corporation Street City, State, Zip Street Telephone: (123) 456-7890
City, State, Zip

Represented by: Attorney Telephone: (321) 456-7890

Allegation: *State briefly what the complainant's allegations are. For example, Complainant alleged that he was fired in reprisal for filing a complaint with HIOSH in violation of Section 396-8(e), HRS.*

Defense: *State briefly what the Respondent's position is. For example, Respondent denies that it terminated the Complainant for filing a HIOSH complaint and assert that the Complainant was discharged for his poor performance, i.e., being continually late in processing his billing statements.*

Coverage: *Give a brief statement of the basis for HIOSH coverage and a basic description of the company. For example, what kind of company is this? What do they do? Interstate? SIC? Headquartered? Union? Number of employees? For example, Respondent is headquartered in Denver, CO, and has rental outlets throughout the western United*

States. Total employees - 17/Non Union. SIC 7512 - Passenger Car Rental and Leasing, Without Driver.

Witnesses: Name, Manager Name, Mechanic (unable to locate for interview)
Street Street
City, State, Zip City, State, Zip
Telephone: (123) 555-4567 Telephone: (123) 555-4567

Investigative Findings:

Tell the story of what happened in chronological order. Start off with a brief history of the company, its organizational structure, the complainant's position, background on the complainant, his/her engagement in protected activity. Work your way up to the events leading to the discriminatory act. Be sure to include your reference to the exhibit that supports your finding. For example:

The Respondent, ABC Corporation, is an automobile rental/leasing company with headquarters located in Denver, Colorado. It has offices throughout the Midwest and Rocky Mountain states. The facility in this case is located in City, State. It is managed by Ms. G, general manager. Mr. B is the office manager, and Mr. M is the shop foreman (Exs 4, 7, 8).

The Complainant was hired by the Respondent on April 3, 1995, as a Mechanic. His wage was \$5.75 an hour, and he worked 40 hours a week, Monday through Friday, without overtime. He reported to Mr. M (Ex 6).

On December 10, 2003 Complainant informed Mr. M it was unsafe.....

Analysis:

- 1 *Protected Activity:*
- 2 *Knowledge:*
- 3 *Adverse Action(Reprisal):*
- 4 *Nexus (Timing, Animus, Disparate Treatment):*

Closing Conference:

Recommendations:

Approved by:

I.M. Supervisor
Date

Sample Final Investigation Report II

[date]

MEMORANDUM FOR: Abbott A. Costello, OH Branch Manager

FROM: Charles E. Todd, Investigator

SUBJECT: O'Brien Drywall/Parker/1501-07001

Final Investigation Report

Date Filed: October 24, 1993, with HIOSH

Complainant: Patrick J. Parker Represented By: Seventh Avenue None. Long Beach, CA
94000 Telephone: (204) 123-4567

Respondent: O'Brien Drywall, Inc. 9876 Oak Street Edward E. Jones, Esq.
Las Vegas, Nevada 56789 Telephone: (101) 202-3303 516

Represented By: Attorney at Law Quasar Street, S.W. Washington, D.C. 20020
Telephone: (202) 798-1236

Allegation: Complainant alleges he was discharged in retaliation for calling HIOSH.

Defense: Respondent claims that complainant was laid off to conform with the requirements of the union contract.

Coverage: O'Brien Drywall, Inc., a Nevada corporation, primarily engages in the installation of wallboard and insulation. It regularly performs work outside the State of Nevada.

List of Witnesses:

Patrick J. Parker - complainant; address above. Rex Abner - Business Agent, Carpenter's Local 123; address below. Kirk Kennedy - Assistant Business Agent, Carpenter's Local 123, 777 Front Street, Long Beach, CA 95000, telephone: 204-999-8222. Chet Nelson - Ex-employee, Rural Route #0, Box 11, Long Beach, CA 9400, telephone: 204-222-4444. Harry S. Briggs - Superintendent, P.O. Box 15723, South Annex Station, Las Vegas, Nevada 56789, telephone: 101-455--5555. Joseph D. Martin - Superintendent, Yale Construction Company, 1089 East Hollywood Drive, Chicago, Illinois 64123, telephone: 333-456-7777. Douglas Ross - Steward, 989 South Pine, Long Beach, CA 94000, telephone: 204-345-7656. Thomas Johnson - ex-employee, 6767 West 34th Street, Long Beach, CA 94000, phone: 204-233-4433. Rick Dupree - ex-employee (not interviewed), address unknown Ted Sanders - telephone: 101-842-1842

Investigative Findings:

The workplace involved is the construction site of a motel building (Park Place Motel) in Long Beach, California. Respondent is a drywall subcontractor contracted by Yale Construction Company to install steel wall studs, insulation, wallboard, and texturing. O'Brien Drywall's portion of the job started on September 20, 1977, and ended on November 14, 1977. Respondent's superintendent on the job was Harry S. Briggs. Briggs was responsible for all construction aspects of the job, including, hiring of employees, timely production, and acquisition of tools, supplies and materials (Ex. 4,5,6).

As work began, Briggs hired six journeyman carpenters, one apprentice carpenter, and an apprentice laborer. Four of the journeymen carpenters and the apprentice were hired out of Carpenter's Local 123 in Long Beach, CA. Briggs brought the other two journeyman carpenters with him from his headquarters location in Las Vegas, Nevada. The Local 123 union contract requires that an employer first hire two journeymen before hiring one apprentice and five additional journeymen for each additional apprentice. An employer, therefore, needs to employ seven journeymen before hiring a second apprentice (see attachment of union business agent at Exhibit 6) . Additionally, it should be explained that the above rule is designed to protect the jobs of journeymen carpenters. Apprentice pay is substantially less than journeyman pay, which may provide an incentive for employers to hire apprentices rather than journeymen, particularly where the work involved does not require much skill (Ex. 4,5,7).

According to the union business agents, Briggs attempted to hire a second apprentice, but Business Agent Abner informed Briggs that the journeyman/apprentice ratio was not sufficient to hire a second apprentice. Briggs then stated that he would bring additional journeymen over from Nevada with him over the weekend of October 15-16, and Abner dispatched Complainant Parker on Monday, October 17, 1977. Assistant Business Agent Kennedy visited the job site that same day; and, upon learning that Briggs had not hired the additional journeymen as promised, he asked Briggs what had happened. Briggs explained that he hadn't had time to get the additional men. Kennedy claims that he let it go at that and never again mentioned the ratio problem to Briggs (Ex 8, 9).

Parker was assigned to installing fiberglass insulation in the walls and ceiling with the other apprentice, Chet Nelson. While working overhead, Parker got fiberglass dust in his eyes and required the help of another carpenter, Rick Dupree, to flush his eyes with water. Parker then asked Briggs for a pair of safety glasses and a respirator for protection against the dust. Briggs did not have safety glasses immediately available but gave Parker a pair of plastic goggles that he borrowed from the electrician. Parker attempted to use the goggles but claimed that they would fog up. He returned the goggles to the electricians' trailer later in the day and informed Briggs that they did not work. At the 2:30 p.m. break, Parker again asked Briggs for safety glasses and a respirator. Briggs asked Parker where he could purchase some, and Parker directed Briggs to a safety supply store nearby. The next day, Parker again asked Briggs for the protective equipment, but Briggs had not acquired any. Parker claims that he further asked Briggs at least twice daily for the personal protective equipment, but Briggs failed to supply it (Ex 4, 10).

On Wednesday or Thursday of the same week, Parker complained to a carpenter steward, James Crockett, about not being provided with the safety equipment and that the labor apprentice, Thomas (Sam) Johnson, was performing carpenter's work by cutting the insulation. Crockett informed Business Agent Abner of the complaint; and, since Abner was going out of town for the rest of the week, he instructed Assistant Business Agent Kennedy to handle the complaint. Kennedy telephoned the HIOSH Consultation Office to check on the requirements for respirators and was informed that the respirators are not required for fiberglass dust as they are for asbestos. Kennedy then visited the job site and confronted Briggs on the job jurisdiction matter only. He did not mention the safety complaint to Briggs at that time (Ex 4, 8, 9 10).

After Kennedy left, Briggs called Parker and Nelson aside and asked them who had complained to the union. Parker said he had done it, and Briggs threatened that if Parker did anything like that again he would be terminated. Briggs told Parker that he worked for him, not the union. Parker then asked Briggs when he was going to get the safety equipment he asked for. Briggs told Parker that he was not going to get it for him anymore (Ex 8, 9, 10).

In his statement, Briggs claims that it was Nelson who had complained about the jurisdiction problem and that he only told Nelson that he "would appreciate it if he brought his problems to me first before going to the union." (Ex 10) Both Parker and Nelson also relate the confrontation as presented above. Also, there is some confusion as to when these events took place. Parker and Nelson are certain that it was on Friday, October 21 (Ex 8). Kennedy recalls that he went to the job site on Wednesday, October 19. Briggs claims that he does not remember the date. It would seem most likely that it was Friday because that date corresponds with Business Agency Abner being out of town; and, therefore, sending Assistant Business Agent Kennedy to handle the complaint (Ex 9).

Parker returned to work on Monday, October 24, and states that he again asked Briggs for the safety glasses and respirator, and Briggs again refused. At the 12:30 lunch break, Parker and Nelson went to a phone booth, and Parker telephoned the HIOSH Consultation Office to inquire about the safety standards that might apply to his situation. Since it was the lunch hour, no one was presently at the HIOSH Consultant Office to answer Parker's questions. Thus, at the 2:30 coffee break, Parker went to the prime contractor's trailer and called HIOSH again. This time, he talked with Complaint Officer Andrew Hunt. Hunt's notes reflect that the call was, in fact, made at that time. As a result of the call, a complaint was accepted and the job site was subsequently inspected. While Parker was placing the call, Yale Construction Company Superintendent Joseph Martin entered the trailer. Martin admits overhearing enough of the conversation to conclude that Parker was calling HIOSH (Ex 11). Martin then went to Briggs and informed him of the incident. Martin further advised the other subcontractors that HIOSH had been called. According to all witnesses contacted, the job site was immediately cleaned up in preparation for an inspection. Briggs also admits that during the 2:30 break, when he asked of Parker's whereabouts, one of the workmen informed him that Parker was at the prime contractor's trailer calling HIOSH (Ex 4, 12).

At approximately 3:45 p.m., Briggs presented Parker with his paycheck and told him that he was laid off. According to Parker, Briggs said he was going to have to go along with the "ratio thing" and further stated, "And I'll tell you another thing, nobody calls HIOSH on me." Nelson

recalls that after Briggs terminated Parker, Briggs made a comment to him (Nelson) something like, "What's with that guy anyhow?", to which Nelson simply shrugged his shoulders (Ex 4, 7).

The following morning (Tuesday, October 25, 1977) Briggs called the union hall and told Business Agent Abner that he was going to go along with the journeyman/apprentice ratio and lay off an apprentice. Abner quotes Briggs as then saying, "By the way, when that kid comes in, tell him that nobody calls HIOSH on me." Abner states that the message was quite clear that Briggs was laying off Parker for calling HIOSH (Ex 7, 9).

Regarding the journeyman/apprentice ratio, the records are somewhat confusing as to whether the proper ratio was ever met. As mentioned above, it is apparent that on October 17, the day Parker was hired, there were only six journeymen and two apprentices. However, it appears that two of the journeymen were later off work. Rick Dupree was absent for the week of October 24 to attend his wedding and honeymoon, and Bob Baker, who initially came with Briggs from Las Vegas, did not work the entire time. Union records in Long Beach are recorded on self-duplicating paper and cannot be legibly photocopied (Ex 13). The company declined to furnish records to this investigator. However, it is interesting to note that on October 24 the respondent requested the dispatch of two additional journeymen which would have made a proper ratio according to Business Agent Abner. Examination of the records indicates that since Dupree was absent, if Baker was also absent, the number of journeymen may have remained at six (Ex 13).

Analysis

Based on the information revealed in the investigation, it appears that the respondent terminated the complainant in reprisal for his safety and health complaints and for calling HIOSH. Such activity is protected under Section 396-8 (e). Parker complained to his superintendent, Briggs, on several occasions about his need for safety glasses and a respirator. This fact is acknowledged by Briggs, himself. Furthermore, Parker did, in fact, call HIOSH from the job site to report his problem, which was translated into a formal complaint. Respondent had knowledge of the call to HIOSH as testified to directly by Superintendent Martin and by Briggs. Animus is evident by Briggs' comments about calling HIOSH to Parker and Nelson at the time of Parker's termination and to Business Agent Abner the next day. Animus is further evidenced by Briggs' comments to Parker and Nelson during the jurisdiction confrontation the previous week. At that time, Briggs threatened to fire Parker if he caused anymore problems. Furthermore, Briggs terminated Parker within an hour of hearing that Parker had called HIOSH.

Respondent's defense appears to be that Parker was laid off to conform with the union provision that required seven journeymen on the job before hiring a second apprentice. Briggs claims that the union complained to him on several occasions about the journeyman/apprentice ratio. However, Business Agents Kennedy and Abner claim that this was only mentioned once by Abner--at the time Briggs requested the second apprentice--and once by Kennedy on Parker's first day at the job. Even Briggs admits in his own statement that Kennedy "didn't make too much of a fuss about it at the time..." Briggs claims that

Kennedy mentioned the ratio a couple of more times when he visited the job site. Kennedy was actually at the job site only one other time, regarding the jurisdiction dispute, and denies mentioning the ratio problem at that time. Briggs' testimony may be further discredited by his claim that Nelson was the one he cautioned about complaining to the union. Parker, Nelson and the union business agents state that it was Parker. This investigator carefully questioned Briggs on this point, but Briggs insisted that it was Nelson (Briggs seemed very much ill at ease throughout the interview).

Closing Conference:

On November 5, 1977, this investigator met in person with Mr. Parker for the purpose of explaining the results of the investigation. Parker was informed that a violation of Section 396-8(e) appeared to have occurred incidental to his discharge at O'Brien Drywall and attempted informal settlement of the matter had been unsuccessful. It was explained the findings of this case. Parker was advised of his rights under the Law. Parker expressed his appreciation for our efforts and acknowledged his understanding of the procedures that will follow in his case.

Recommendation:

On November 4, 1977, this investigator attempted settlement negotiation with Mr. John O'Brien, president of O'Brien Drywall, Inc. Parker earned \$8.73 per hour for 36 hours per week, and the initial settlement offer was for three weeks' wages (it is virtually impossible to determine how long Parker would have remained employed. Other carpenters began being laid off about October 31). Mr. O'Brien declined the offer and refused to consider settlement. He stated that he had beat the government before, and he would do it again. In consideration of the investigation findings, it is recommended that the case to be a merit finding.

PAT GRIFFIN Investigator,

Approved:

My. Supervisor

Date

Sample Final Investigation Report III

Final Investigation Report

Date

Respondent/Complainant/Case No. ##-###

Investigator: Investigator's Name

Date Filed: date complaint filed

Complainant: Complainant
Address
Phone #

Represented by:
Attorney
Address
Phone #

Respondent Name
Address
Phone #
Fax #

Represented by:
Attorney
Phone #
Fax #

Allegation: Complainant was terminated for _____.

Defense: Complainant was terminated because of substandard performance, disruption to efficient operations, failing to respond effectively to a coworker's inquiries and failing to perform administrative tasks in a professional manner.

Coverage: Respondent is primarily engaged in _____. Total Employees-###/Non Union. SIC ####/NAICS #####.

List of Witnesses: List witnesses interviewed and potential witnesses interviewed.

Chronology of Events:

Date Event

Date Event

Date Event

Date Event

Investigative Findings:

Findings 1 [Exhibits (III) C2(c), C2(k)].
Findings 2 [Exhibit (III) B].
Findings 3 [Exhibits (III) A1-A4].
Findings 4 [Exhibit (III) B].

Discussion:

Enter your discussion.

Analysis:

Based on the four elements: Protected Activity; Employer Knowledge;
Adverse Action(s); Nexus.

Closing Conference:

A closing conference was attempted on Date @ Time. Complainant was informed that ... and the complainant's appeal rights was told to him/her.

Recommendations:

I recommend that HIOSH dismiss this discrimination case because there was insufficient evidence to show there is a violation of Chapter 396-8(e) H.R.S.

Investigator's Signature

Concurred by:

Occupational Health Branch Manager

Sample Final Investigation Report IV

Final Investigation Report Deemed Inappropriate for Full Field Investigation Date

Respondent/Complainant/Case No. ##-###

Investigator: Investigator's Name

Date Filed: date complaint filed

Complainant:	Complainant	Represented by:
	Address	Attorney
	Phone #	Address
		Phone #

Respondent	Name	Represented by:
	Address	Attorney
	Phone #	Phone #
	Fax #	Fax #

Findings:

Chapter 6

Settlement Agreements

Resolution of complaints is best effected at the lowest possible level and at the earliest possible date.

I. Scope. This section covers policy and procedures for the effective negotiation and documentation of settlement of meritorious cases.

II. Settlement Agreement Policy. It is HIOSH policy to seek settlement of all cases. Further, although HIOSH will not, itself, seek settlement of cases in which a merit finding has not been reached, HIOSH will make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation.

III. Early Voluntary Resolution.

- A. Ideally, as with safety and health issues, employer/employee disputes should be resolved between the principals themselves to their mutual benefit without third-party interference. The Director favors voluntary resolution of disputes through alternative dispute resolution processes. It is also HIOSH policy to defer to adequate privately negotiated settlement of such disputes, although such settlements must still be reviewed and approved by the OH Branch Manager to ensure that the terms of the settlement are consistent with the purpose and intent of the Law.
 - 1. If the complainant and respondent settle the dispute between themselves or if settlement is reached through the grievance-arbitration process or other means prior to HIOSH reaching a determination, the case may be concluded in one of two ways.
 - a. The complainant may wish to withdraw the complaint.
 - b. The Administrator may issue a determination letter deferring to the outcome reached among the parties.
 - 2. In either event, the case will be recorded in the IMIS as "Settled - Other".
- B. On the other hand, HIOSH should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

IV. Settlement Agreement Procedure.

- A. Requirements. Requirements for all settlement agreements are:
 - 1. The investigative case file must address all elements of a *prima facie* allegation.
 - 2. The file must list all appropriate relief at that juncture of the process and the relief obtained.
 - 3. The settlement must contain all of the following core elements of a settlement agreement:
 - a. It must be in writing.

- b. The employer must agree to comply with the relevant statute(s).
 - c. It must address alleged retaliation.
 - d. It must specify the relief obtained.
 - e. It must address a constructive effort to alleviate the chilling effect, such as the posting of the agreement or an equivalent notice, or fully explain why notice to remaining employees is not necessary.
4. Adherence to these "core" elements should not create a barrier to getting an early settlement and adequate remedy for the complainant, and concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the OH Branch Manager.
- a. All appropriate relief/damages to which the complainant is entitled must be documented in the file. If the settlement does not contain a make whole remedy, justification for such and the complainant's concurrence must be noted in the file and the Final Investigation Report.
 - b. In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action had on co-workers. Posting of the settlement agreement or a notice to employees may be a remedy, but may also be an impediment to a settlement. A respondent's refusal to post such a notice should not be allowed to prevent the achievement of an otherwise satisfactory agreement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.
 - c. To facilitate settlement in the field, the preprinted Settlement Agreement and Notice to Employees may be utilized (copies of the Notice and sample Settlement Agreements are included at the end of this chapter). The preprinted agreements should be used only as a field expedient; it is preferable to write settlement agreements tailored to the specific issues and requirements of the case.

B. Adequacy of Settlements.

1. Full Restitution. Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual meritorious case must be carefully explored and documented by the Investigator. One hundred percent relief should be sought during settlement negotiations wherever possible. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass any or all of the following, and is not necessarily limited to:
- a. Reinstatement to the same or equivalent job, including restoration of accumulated seniority and benefits. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.
 - b. Wages lost due to the adverse action. (NOTE: Unemployment compensation benefits may never be considered as a back pay offset.)
 - c. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file.
 - d. Respondent's agreement to provide to the complainant a neutral reference to

potential employers.

- e. Posting of a notice to employees indicating that the respondent agreed to comply with the relevant discrimination statute and that the complainant has been awarded appropriate relief.
- f. One lump sum payment to be made at the time of the signing of the settlement agreement as agreed by the parties.

C. Documentation.

- 1. Although each agreement will, by necessity, be different in detail, the general format and wording of the sample agreements will be used.
- 2. Investigators will document in the file, and reference in the FIR, justification for the restitution obtained. If the settlement falls short of a full remedy, reasons for such must be explained, along with an explanation that the complainant is aware of his or her entitlement and has chosen to accept a lesser amount.
- 3. Back pay computations must be included in the case file, and referenced in the FIR, with explanations of calculating methods and relevant circumstances as necessary.

- D. Enforcement. In all cases where there has been a settlement, either before or after the issuance of findings, and the employer fails to comply with the settlement, this failure may be treated as a new instance of retaliation and require the opening of a new case or it may be appropriate to confer with the DAG's office to consider the possibility of issuing findings in the original case or direct enforcement of the settlement agreement, itself, in court. Depending on the nature of the case, one or the other option might be preferable.

Sample Documents

from

Chapter Six

Settlement Agreement I	6-5
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Settlement Agreement III	6-7
Backpay Calculation Sheet	6-9
Notice to Employees.....	6-10
Respondent Settlement Confirmation Letter	6-11
Complainant Settlement Confirmation Letter	6-12

Sample Settlement Agreement I

In the matter of: John Doe v. ABC Corporation
Case No. 1501-07001

SETTLEMENT AGREEMENT

The undersigned Respondent and undersigned Complainant, in settlement of the above matter and subject to the approval of the Regional Administrator, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE -- Upon approval of this agreement, the Respondent will post immediately in conspicuous places in and about its facility, including all places where notices to employees are customarily posted, and maintain for a period of 60 consecutive days from the date of posting, copies of the Notice to Employees attached hereto and made a part hereof, said Notice to Employees to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon.

COMPLIANCE WITH NOTICE -- The Respondent will comply with all terms and provisions of said Notice to Employees.

MAKE WHOLE -- The Respondent will make whole the Complainant, John Doe, by:

- 1 Reinstating him to his former position, without loss in seniority or wages.
- 2 Providing back pay in the amount of \$1,000.00 which constitutes loss wages from June 1, through June 17, 2000.
- 3 Expunging all records relating to the disciplinary action taken on May 27, 2000.

PERFORMANCE -- Performance by the Respondent with the terms and provisions of the Agreement shall commence immediately after the agreement is approved.

This agreement in no way constitutes an admission by Respondent of wrongdoing or a violation of any statute administered by the Hawaii Occupational Safety and Health Division and nothing in this agreement may be used against Respondent except for the enforcement of its terms and provisions.

The complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against ABC Corporation arising out of his complaint filed with HIOSH on June 5, 2000, and will cause the complaint to be closed.

Sue P. Visor Date John Doe Date ABC Corporation, Respondent Complainant

Approved By:

Name Date OH Branch Manager

Sample Settlement Agreement II

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY & HEALTH DIVISION

In the Matter of: Respondent/Complainant/Case #

Pre-DETERMINATION SETTLEMENT AGREEMENT

Whereas, complainant _____ has filed a complaint under Chapter 396 -8(e) of the Hawaii Occupational Safety & Health Law, alleging a violation of said Law, and

Whereas, Respondent _____, without admitting any violation of the said Law, is desirous of settling such complainant without prejudice to either party, the undersigned complainant and respondent **HEREBY AGREE AS FOLLOWS:**

1. The respondent is to pay back wages in the amount of \$_____ less normal deductions, for the period of _____ to _____ to the complainant.
2. Expunge all unfavorable personnel file materials.
3. Hire Complainant back with full benefits as if he /she has continued to work at the company.
4. Complainant agrees to accept this agreement in full and complete settlement of any and all claims arising out of filing of his/her complaint against respondent. Complainant understands and agrees that, upon his/her acceptance of this agreement, the Hawaii Occupational Safety & Health Division will not proceed further on his/her complaint and will cause the complaint to be administratively closed.

Respondent

By: _____
Complainant

By: _____
Signature

Print Name

Print Name & Title

Date

Witnessed by:

Approved by:

EHS Date

Director of Labor date

Sample Settlement Agreement III

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY & HEALTH DIVISION

In the Matter of: Respondent/Complainant/Case #

Employer: Respondent

SETTLEMENT AGREEMENT

The undersigned employer and the Director of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division (HIOSH), in settlement of the discrimination complaint filed on Date , by Respondent , hereby agree as follows:

1. The employer and Director agree that:
 - a. Respondent shall offer Complainant back his/her job by Date without any loss of seniority, work credits for vacation, and any other benefits prior to his termination.
 - b. The personnel file of Complainant shall be purged of any adverse material that was put into his file on and after Date.
 - c. Respondent shall make the Complainant whole and shall pay complainant a back pay of \$ Calculated amount (less mandatory payroll deductions).
 - d. Employees shall not be discriminated against for engaging in protected activities such as:
 - (1) Filing any complaint under or related to the law;
 - (2) Instituting or causing to be instituted any proceeding under or related to the law;
 - (3) Testifying or intending to testify in any proceeding under or related to the law;
 - (4) Exercising on their own behalf or on the behalf of others any right afforded by the law;
 - e. The Notice to Employees shall be posted in Respondent's employee bulletin board for a period of 60 days.
2. The employer agrees to comply with the Hawaii Occupational Safety and Health Law and the applicable safety and health standards.

3. By entering into this agreement, the employer does not admit that it violated the cited statute for any litigation or purpose other than a subsequent proceeding under the Hawaii Occupational Safety and Health Law.
4. The employer agrees and understands that if employer fails to comply with each and every term of this agreement, this agreement shall be null and void upon written notice by the Director and a penalty of \$X,XXX shall be issued due and payable to the department.

Respondent
Company's Name

OH Branch Manager

Date _____

Date _____

Approved by:

NELSON B. BEFITEL, DIRECTOR
Department of Labor & Industrial Relations

Date

Backpay Calculation Sheet

Pay Period from to

Each paid period = ### hours per day

/ 8= ## working days

days x # hours per day @ \$##.## per hour = \$###.##

Minus wages difference with the new employer

Pay period from to

days x # hours per day @ \$##.## per hour = \$###.##

Plus Over Time

Each paid period = #days = ## overtime work hours = ## hours per day

= # working days

days x # hours per day @ \$##.## per hour = \$###.##

$#####.## - \$### - \$##.## + \$###.## = #####.## \text{ (less mandatory payroll deduction)}$

NOTICE TO EMPLOYEES

PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

1. The employer agrees that it will not 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 the Hawaii Occupational Safety and Health Law, Section 396-8(e), HRS (HIOSH Law) or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Law.
2. The employer agrees that it will not advise employees against exercising rights guaranteed under the HIOSH Law, such as contacting, speaking with, or cooperating with Hawaii Occupational Safety and Health Division (HIOSH) officials either during the conduct of an occupational safety and health inspection of the employer's facilities or in the course of an investigation.
3. The employer agrees to ensure that all personnel in his/her employ will in no manner discriminate against the complainant or any other employee because they question safety and health on the job, lodge complaints with management of potential unsafe or unhealthy working conditions or unsafe or unhealthy work practices, or file complaints with the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, or any other agency whose function is to regulate and promote job safety and health.
4. By signing this notice, company's name does not admit that it in fact discriminated against any employee.

Signed _____
President ABC Corporation

Date

Sample Respondent Settlement Letter Section 396-8(e) Complaint

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor
Phone: (808) 586-9116 / Fax (808) 586-9104
Email: dir.hiosh@hawaii.gov

[date]

Mr. President ABC
Company Street
Address City, State
ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. President:

This is to acknowledge receipt of ABC Company's check in the amount of \$860.50, payable to Mr. I. M. Complainant in the above-referenced complaint. The check has been sent under separate letter to the complainant. Also enclosed for your records is a copy of the signed Settlement Agreement. Upon full compliance with the terms of the Settlement Agreement, this office considers the case closed.

We sincerely appreciate your cooperation in resolving this matter. If at any time you need information on employee rights and employer responsibilities under the statutes administered by the Hawaii Occupational Safety and Health Division, please feel free to contact this office by mail or telephone.

Sincerely,

Manager Occupational Health Branch

Enclosure: Copy of Settlement Agreement

cc: Attorney



**Sample Complainant Settlement Confirmation Letter Section 396-8(e)
Complaint**

LINDA LINGLE
GOVERNOR



NELSON B. BEFITEL
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HAWAII 96813

www.hawaii.gov/labor

Phone: (808) 586-9116 / Fax (808) 586-9104

Email: dir.hiosh@hawaii.gov

[date]

Mr. U. R. Complainant Street Address City, State ZIP

Re: ABC Company/Complainant/Case No. 1501-07001

Dear Mr. Complainant:

Enclosed is your check from ABC Company in the amount of \$860.50, which represents payment in full according to the terms of the settlement. Please cash the check promptly. Also enclosed for your records is a copy of the signed settlement agreement.

Thank you for your cooperation in successfully resolving this matter. If at any time you need information on employee rights and employer responsibilities under the statutes administered by the Hawaii Occupational Safety and Health Division, please feel free to contact this office by mail or telephone.

Sincerely,

Manager Occupational Health Branch

Enclosures: Check No. 11136 Copy of Settlement Agreement

cc: Attorney



Chapter Seven

Section 11(c) of the Occupational Safety and Health Act Public Law 91-596, Dec. 29, 1970 29 USC §660

- I. **Introduction.** Section 11(c) of the OSH Act mandates that, “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...”
- II. **Regulation.** This chapter explains significant legal interpretations pertaining to federal regulations (29 CFR 1977), and identifies a source of pertinent judicial decisions relating to discrimination (Section 11(c)) case law.

NOTE: This chapter discusses 29 CFR 1977, Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970. HIOSH will follow the federal guidelines except that HIOSH allows 60 days for filing a complaint. Hawaii’s equivalent of 11(c) is Section 396-8(e), Hawaii Revised Statutes.

III. **Coverage.**

- A. Any private sector employee of an employer affecting interstate commerce is covered by the Act. Public sector employees (those who employed as municipal, county, state, or federal workers) are not covered by Section 11(c). Exception: On September 29, 1998, OSH Act coverage was extended to employees of the U.S. Postal Services (USPS). (Public Law 105-241).
- B. Executive Order 12196 and 29 CFR 1960.46 require all federal agencies to establish procedures to ensure that no employee is subject to discrimination or reprisal for the types of activities protected by Section 11(c). A Federal employee who wishes to file a complaint alleging discrimination due to occupational safety and health activities should be referred to the employee’s personnel office and office of Federal agency Programs for assistance in filing a complaint, as well as to the office of special Counsel of the Merit Systems Protection Board.

IV. **Interpretations.** The interpretations in this chapter clarify the more common issues that investigators face, or are likely to face, in daily routine. They are to be used only as reference for the field offices. The 11(c) Program’s current interpretations and application of section 11(c) (1) and 29 CFR 1977 are as follows:

- A. **Protected Activity.** Activities protected by Section 11(c) fall into five broad categories:
1. Occupational safety and health complaints filed with OSHA or another agency of government which has the effect of protecting employee safety (e.g. fire department);
 2. Complaints or other safety concerns communicated to the employee’s supervisor or higher management;

3. Participating in an OSHA inspection or other proceeding under the Act;
4. Providing testimony in the course of a judicial or administrative proceeding; and
5. Refusing to perform a task that the employee reasonably believes presents a real danger of death or serious injury.

B. 29 CFR 1977.6 – Unprotected Activities Distinguished. 29 CFR 1977.6 (b) states: “...the employee’s engagement in protected activity need not be the sole consideration behind the discharge or 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.”

1. A complainant’s work record may sometimes contain many instances of absenteeism, insubordination, etc., or the complainant may be less than a model employee in terms of appearance, demeanor or character, or the complainant may be extensively engaged in activities protected under other statutes such as the National Labor Relations Act. If the investigation reveals that the complainant would not have been discharged at a particular moment in time but for engagement in protected activities (e.g., the straw that broke the camel’s back), then a violation exists.
2. In terms of a “substantial reason”, if investigation reveals that the protected activity was a deliberate consideration; i.e., evidence exists to show that the respondent discussed or considered the protected activity specifically as partial reason for the adverse action, then a violation exists regardless of the fractional portion of total reasons for the action.

C. 29 CFR 1977.12 – Exercise of Any Rights Afforded by the Act. 29 CFR 1977.12(b) (1) states “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 condition...” However, 29 CFR 1977.12(b) (2) explains that under certain conditions employees may be protected for refusing to expose themselves to a dangerous condition where no reasonable alternative exists. It states “The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person under the circumstances...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 employer, and been unable to obtain, correction of the dangerous condition.”

1. Two key considerations in applying this provision are whether the hazard is a real danger of death or serious harm as opposed to a potential danger, and whether there is sufficient time to resort to the imminent danger procedures. Care shall be taken to distinguish between the “imminence” of the danger as opposed to the “urgency” of the situation. If the employee does not perform the task, there is no exposure to danger.

2. Urgency of the situation means that conditions are such that the employee does not have the opportunity to resort to statutory enforcement channels; e.g., the OSHA office is closed, there is no telephone at the worksite, the employer issues the ultimatum “work or be fired”, thus making a call to OSHA a non-consideration.
3. 29 CFR 1977.15 – Filing of Complaint for Discrimination. Section 11(c) provides that an employee “may, within 30 days after such violation occurs,” file a complaint of discrimination. 29 CFR 1977.15 further defines that provision and sets forth certain circumstances which could justify tolling the 30-day filing period.
 - a. The present policy is:
 - i. Accept complaints filed within 30 days of the alleged violation.
 - ii. Accept complaints filed after 30 days of the alleged violation, if strong extenuating circumstances are found such as those listed under Occupational and Safety Standard 12-57-8.
 - iii. Complaints filed after 30 days of the alleged violation, will be closed unless strong extenuating circumstances can be found such as those listed under Occupational and Safety Standard 12-57-8.
 - b. Because of the policy stated in B.3.a. above, circumstances which would act to toll the 30-day filing period must be broadly viewed. A full-field investigation shall be conducted if evidence establishes that a late filing was caused by any of the following:
 - i. The employer has concealed or misled the employee regarding the grounds for discharge or other adverse action or has contributed to the delayed filing by failing to post the OSHA Poster which advises employees of their rights under the Act.
 - ii. The discrimination is of a continuing nature.
 - iii. The employee has made reasonable efforts to file a complaint within 30 days, but was unable to contact an agency representative, or received erroneous information from the agency.
 - iv. The employee has proof that, within 30 days of the alleged violation, he or she forwarded a letter alleging an 11(c)-type violation to an official of the U. S. Department of Labor, a Senator’s or a Congressman’s office, or the President of the United States. If one of these Federal Officials has rejected the complaint, the 30-day filing period would begin after the employee has been notified of the rejection.
 - v. The employee is unable to file within 30 days due to illness or injury. Conditions should be such that a reasonable person with the same type of illness or injury would not have been able to pursue a complaint.
 - vi. The employee is unable to file within 30 days due to a natural disaster such as a snow storm or flood. Conditions would be such that a reasonable person, under the same circumstances would not have been able to pursue a complaint.
 - c. The circumstances (B.3.b. above) are not to be considered all-inclusive, but provide a basic framework within which to make a decision on whether to conduct a full-field investigation. Conditions which shall not be considered as tolling circumstances are:
 - i. Ignorance of the 30-day filing period,
 - ii. Filing of unemployment compensation claims,

- iii. Filing worker's compensation claim, or
 - iv. Filing a private negligence of damage suit.
 - v. Filing a grievance – arbitration action.
 - vi. Filing a discrimination complaint with a State Plan State.
4. 29 CFR 1977.18 – Arbitration or Other Agency Proceedings. A discrimination complaint filed with HIOSH frequently is also filed with another jurisdiction such as a State Plan State, the NLRB, or grievance and arbitration proceedings. Section 1977.18 essentially states that the Secretary may defer or postpone determination pending results of such proceedings under certain circumstances. In practice, the procedure is to take a comprehensive statement from the complainant in all cases. From that, it should become clear what other remedies have been pursued and the current stage of the proceeding.
- a. If the other proceeding has been completed and the complainant has been made whole (to include reinstatement, back pay, expungement of personal records, posting of a notice as appropriate), there is obviously no further remedy and deferral to the other proceeding is in order. Proper documentation to the file must be made (court order, statements, copy of a check, etc.) to support the findings and recommendation. The other jurisdiction in such an instance must have the power and authority to decide a discrimination issue as outlined in 29 CFR 1977.18.
 - b. If something other than the above has occurred (e.g., the other proceeding is pending, a non-merit determination has been made, the complainant has been made less than whole), the investigation shall be continued to its logical conclusion independent of the other jurisdiction at all times. HIOSH would not defer to a non-merit determination of another jurisdiction except under unusual situations, but rather dismiss or approve withdrawal as appropriate.
 - c. Where another jurisdiction has made a merit determination but the complainant has not yet been made whole (e.g., case is pending a court hearing; or complainant has not yet received restitution as a result of a court order or administrative hearing), HIOSH would postpone determination pending outcome of the litigation or receipt of restitution. Decisions to defer a determination or postpone an investigation shall be made by the HIOSH's Administrator.

V. Judicial Decisions. State of Hawaii Chapter 396-8(e) current case decisions can be found at the Hawaii Labor Relations Board web site (<http://hawaii.gov/labor/hlr/decisions.shtml>). The Occupational Health Branch Manager and Investigators shall review appropriate case law, when necessary.

VI. Complaint. Complaint About a State Plan Administration (CASPA) can be filed with the OSHA Regional 9 office. If a complainant felt that the investigation was not conducted in accordance with established procedures, a complaint can be filed at the following address:

San Francisco Federal Building
OSHA – Regional Administrator
90 7th Street, Suite 18-100
San Francisco, CA 94103

- A. Upon receipt of such a CASPA, OSHA will review the state's investigation file and conduct other investigation deemed necessary to determine if the state's investigation was adequate and that the determination is supported by the appropriate available evidence.

If the state's investigation is deemed adequate and meets the criteria established in 29 CFR 1977.18(a)(3), the complainant will be advised that OSHA defers its determination to the outcome of the state proceeding.

- B. If the state's investigation is inadequate, OSHA will advise the state of the specific deficiencies and request that the case be reopened and the deficiencies corrected, after which OSHA will defer the outcome of the state.

Chapter 8

Other Whistleblower Acts not covered by HIOSH

There are other Whistleblower Acts in existence that HIOSH does not have jurisdictions over. The following table contains a list of those whistleblower Acts and numbers of days a complainant has to file a complaint. Any complaints received that would be applicable under these Acts will be given to the SI.

Whistleblower Acts	No. of days to file
Asbestos Hazard Emergency Response Act (AHERA)	90 days
International Safe Container Acts (ISAC)	60 days
Whistleblower Provision of the Services Transportation Assistant Act (STAA)	180 days
Environmental Protection Agency Statutes – The clean Air Act (CAA), The comprehensive Environmental Response, Compensation and Liability Act (CERCLA), The federal Water Pollution Control Act (FWPCA), The Safe Drinking Water Act (SDWA), The Solid Waste Disposal Act (SWDA), The Toxic Substance Control Act (TSCA)	30 days
Energy Reorganization Act of 1978 (ERA)	180 days
Wendell H. Ford Aviation Investment and Reform Act for the 21 st Century (AIR21)	90 days

Chapter 9-15

Reserved