

CHAPTER X

DISCRIMINATION

- I) **Scope.** This chapter provides general guidelines, policies, and procedures during the course of a discrimination investigation. The investigator is responsible for pursuing all appropriate investigative leads deemed pertinent to the investigation.

II) **Introduction.**

- A) KRS 338.121(3) provides, in general, that no person shall discharge or in any manner discriminate against any employee because the employee has:

- i) Filed any complaint related to KRS Chapter 338;
- ii) Instituted or caused to be instituted any proceeding related to KRS Chapter 338;
- iii) Testified or is about to testify in any proceeding related to KRS Chapter 338; or
- iv) Exercised on his own behalf or on behalf of others any right afforded by KRS Chapter 338.

NOTE. The use of the word "person" as opposed to "employer" indicates that KRS 338.121(3) is not limited to actions taken by employers against their own employees. A person may be cited for discriminatory action against an employee of another person.

- B) Any employee who believes that his or her employer has discriminated against him or her in violation of KRS 338.121(3) may, within 120 days after such violation occurs, file a complaint with the commissioner of workplace standards (commissioner) alleging such violation. The commissioner will initiate an appropriate investigation.

NOTE. KRS 338.121(3) extends to such entities as organizations representing employees for collective bargaining purposes, employment agencies, other employers, or any other person in a position to discriminate against an employee.

- C) When the commissioner determines the provisions of KRS 338.121(3) have been violated, a citation and penalty of up to \$10,000 per violation may be issued to the violator. Abatement may include any appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.
- D) The commissioner may apply to an appropriate court for a restraining order. The secretary of the Education and Labor Cabinet has the authority under KRS 338.121(3)(b) to reinstate the employee prior to a final order. The respondent may contest citations and penalties issued under KRS 338.121(3) before the Occupational Safety and Health Review Commission (Review Commission), who has the authority to order all appropriate relief.

III) **Duties and Responsibilities.**

- A) **Commissioner of Workplace Standards.** The commissioner has the overall responsibility for the administration, policy, and direction of the KY OSH discrimination program and is the

deciding official on the merits of cases investigated. The commissioner may delegate specific responsibilities to others as deemed appropriate.

- B) **Assistant Director.** The assistant director is responsible for the overall coordination of activities associated with KY OSH discrimination cases. The assistant director reviews casefiles, issues citations in meritorious cases, and issues final letters in non-meritorious cases.
- C) **Supervisor.** Investigators are supervised by the assistant director or designee. Under the guidance and direction of the commissioner or designee, the supervisor is responsible for implementing policies and procedures and supervising discrimination investigations, including the following functions:
- i) Coordinating with discrimination investigator(s) to initiate investigative actions;
 - ii) As needed, investigating or conducting settlement negotiations for cases that are unusual or of a difficult nature;
 - iii) Providing guidance, assistance, supervision, and direction to investigators during investigations and settlement negotiations;
 - iv) Reviewing investigative reports for comprehensiveness and technical accuracy and revising draft Citation and Notifications of Penalty and presenting them for signature by the commissioner or designee;
 - v) Coordinating and maintaining liaison with the general counsel;
 - vi) Recommending changes in policies and procedures to better accomplish agency objectives;
 - vii) Ensuring the investigator(s) receive required training (formal and field);
 - viii) Performing necessary and appropriate administrative and personnel actions such as performance evaluations; and
 - ix) Conducting informal conferences following issuance of a citation.
- D) **Discrimination Investigator.** The KY OSH discrimination investigator has the responsibility for all investigative aspects of the case including:
- i) Receives discrimination complaints from field investigators, complainants, or others;
 - ii) Issues opening letters to complainant and respondent requesting preliminary information;
 - iii) Conducts KY OSH discrimination investigations;
 - iv) Explains all aspects of KY OSH discrimination statutes, regulations and procedures to respondents, employees, union representatives, etc.;
 - v) Interviews complainants, respondents, and all potential witnesses and collects supporting, documentary evidence;

- vi) Follows up on leads resulting from interviews, statements, and documents;
- vii) Advises and briefs the assistant director regarding cases;
- viii) Applies knowledge of legal elements and evaluates evidence revealed, and recommends appropriate action to the assistant director;
- ix) Drafts the Final Investigative Report (FIR) for the assistant director's review;
- x) Drafts the Citation and Notification of Penalty for the assistant director's review;
- xi) Acts as intermediary in settlement negotiations between employees and employers as appropriate when circumstances permit;
- xii) Coordinates with unions and/or other agencies investigating the same case, such as the National Labor Relations Board, etc.;
- xiii) Handles daily communications with complainants, employers, and others seeking information about KY OSH discrimination;
- xiv) Attends training and/or conferences relevant to KY OSH discrimination investigations etc.; and
- xv) Maintains the official file(s) of all discrimination cases.

E) General Counsel's Office (OGC). The OGC is responsible for all legal aspects of each case:

- i) Offers legal advice and recommendations on KY OSH discrimination cases;
- ii) Advises the investigator and assistant director regarding settlements, jurisdictional issues and other legal matters during the investigative stage;
- iii) Drafts all subpoenas and/or search warrants for the commissioner's signature;
- iv) Litigates contested cases;
- v) Closes KY OSH discrimination cases upon completion of litigation; and
- vi) Responds to Open Records Act requests regarding KY OSH discrimination cases.

IV) Persons Protected by KRS 338.121(3).

- A) KRS 338.015(2) defines an employee as "any person employed" except employees of the United States government and those over which federal agencies other than the Occupational Safety and Health Administration (OSHA) exercise statutory authority to prescribe or enforce regulation affecting OSH. Employees of state and political subdivisions are covered.
- B) Because KRS 338.121(3) speaks in terms of any employee, it is clear the employee need not be an employee of the discriminator.

- i) The principal consideration is whether the person alleging discrimination was an employee at the time of engaging in activity protected by KRS Chapter 338.

EXAMPLE: An employee working as an employee of a subcontractor at a company may have a discrimination claim against the host employer when that employer orders him or her off his site because the employee engaged in protected activity.

- ii) Employers are prohibited from discriminating against relatives, significant others, and/or fiancés of an individual engaging in protected activity.

V) Activities Protected under KRS Chapter 338.

- A) Filing safety and health complaints with KY OSH, OSHA, or other agencies which contribute to the elimination of workplace hazards;
- B) Bringing hazardous conditions in the workplace to the attention of management;
- C) Requesting information from the KY OSH Program;
- D) Participating in a KY OSH inspection or consultative survey either by providing information to the CSHO such as responding to questions, or by serving as an authorized representative of employees;
- E) Receiving pay at their regular rate while participating in safety and health inspections or surveys when on regular duty time;
- F) Refusing to work when dangerous conditions exist;
 - i) Right to Refuse Task. 803 KAR 2:220 establishes that employees, in good faith, can refuse to perform an assigned task when confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury, illness, or death arising from a hazardous condition at the workplace. When employees, with no reasonable alternative, refuse in good faith to expose themselves to a dangerous condition, they are protected against subsequent discrimination.
 - (a) The condition causing the employees' apprehension of serious injury, illness, or death must be of such a nature that a reasonable person, under the circumstances then confronting the employees, would conclude there is a real danger of death or serious injury and there is insufficient time, due to the urgency of the situation, to eliminate the danger through resorting to regular statutory enforcement channels.

NOTE. "Urgency of the situation" means that conditions are such that the employee does not have the opportunity to resort to statutory enforcement channels;

EXAMPLE: The KY OSH program offices are closed, there is no telephone at the worksite, the employer issues the ultimatum "work or be fired," thus making a call to the KY OSH program a non-consideration.

- (b) Employees, when possible, must also have sought and been unable to obtain a correction of the alleged dangerous condition from their employer.
- ii) No Right to Walk Off Worksite. The employee has the right to request an inspection of the workplace pursuant to KRS 338.121 when an employer fails to correct violations brought to its attention or to seek the assistance of other public agencies, which have responsibility in the field of safety and health. Under such circumstances, an employer would not ordinarily be in violation of KRS 338.121(3) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
- G) Agreeing to testify, participating, and providing testimony in any occupational safety and health proceeding, hearing, contested case, etc.

NOTE. This protection is not limited to testimony in proceedings instituted or caused to be instituted by the employee, but extends to any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, administrative rule making, or adjudicative functions.

VI) Activities Not Protected by KRS Chapter 338.

- A) Situations sometimes develop which on the surface appear to be related to KY OSH but are not necessarily rights afforded to employees under the law and do not result in anti-discrimination measures being invoked such as:
 - i) Actions taken by an employer, or others, which adversely affect an employee, may be predicated upon nondiscriminatory grounds. KRS 338.121(3) applies when the adverse action occurs because the employee engaged in activities protected by KRS Chapter 338.
- NOTE.** An employee's engagement in activities protected by KRS Chapter 338 does not automatically render him or her immune from discharge, discipline for legitimate reasons, or adverse action dictated by non-prohibited consideration.
- ii) To establish a violation of KRS 338.121(3), the employee's engagement in activity protected under KRS Chapter 338 need not be the respondent's sole motivation behind discharge or other adverse action. KRS 338.121(3) is violated when activity protected under KRS Chapter 338 is a substantial reason for the action, or when the discharge or other adverse action would not have taken place "but for" engagement in activity protected under KRS Chapter 338. Ultimately, the issue as to whether a discharge was due to activity protected under KRS 338.121 must be determined on the basis of the facts in each case.
- B) Suffering a work-related injury or illness. Being injured or involved in an accident is not an activity protected by KY OSH discrimination laws. Although an employee discharged after becoming ill or being hurt due to an employer's negligence may have recourse to private civil action such as wrongful discharge lawsuit, KY OSH discrimination statutes do not apply.
- C) Quitting or walking off the job due to potential unsafe or unhealthful working conditions are actions that exceed an employee's right to refuse to perform a dangerous task and are normally not

protected activities. Refusing to perform a specific assignment that could cause death or serious physical harm is activity protected under KRS Chapter 338 while walking off the job is not.

- D) Employee activities protected by KY OSH discrimination laws do not automatically render employees immune from discharge or discipline for legitimate reasons.

VII) **KY OSH Discrimination Complaints.**

A) **Complaint Elements.**

- i) Oral or written notification;

NOTE. Written complaints signed by the employee or a representative authorized to file on his or her behalf are preferred.

- ii) Involving an occupational safety and health concern; and

- iii) Made by an employee, former employee, or their representative to an employer, governmental agency, or commissioner.

NOTE. Complaints registered with other agencies that have the authority to regulate or investigate OSH conditions are complaints "related to" this chapter. Such complaints must relate to conditions at the workplace where employees are exposed, as distinguished from complaints related to general public safety and health.

- B) **Who may file.** The complainant or his or her representative may file a complaint alleging discrimination.

C) **Nature of filing.**

- i) Each complaint must include:

- (a) The date of the alleged violation;

NOTE. Complaints must be made within 120 days from the occurrence of the alleged discriminatory activity.

- (b) The name(s) and address(es) of the affected employee(s);

- (c) The name and address of the employer; and

- (d) A description of the alleged violation.

NOTE. Whenever possible, the person receiving an oral complaint must also request and document the complainant's telephone number and email.

NOTE. While conducting an inspection, a CSHO may receive a complaint alleging discrimination. The CSHO will request the information described above and refer to the discrimination investigator(s).

D) **Time for filing.** Complaints not filed within 120 days of an alleged violation will be presumed to be untimely.

E) **Amending Complaints.** After filing a discrimination complaint with KY OSH, a complainant may amend the complaint to add additional allegations and/or additional respondents.

i) Form of Amendment. No particular form of amendment is required; however, KY OSH prefers a written amendment.

ii) Amendments Filed within 120 Days. At any time prior to the expiration of the statutory filing period for the original complaint, a complainant may amend the complaint to add additional allegations and/or additional respondents.

iii) Amendments Filed After 120 Days. The investigator must evaluate amendments received after the 120-day deadline for the original complaint to determine whether the proposed amendment (adding subsequent alleged adverse actions and/or additional respondents) reasonably falls within the scope of the original complaint.

NOTE. KY OSH accepts amendments that reasonably relate to the original complaint provided the investigation is still open. When the investigator determines an amendment is unrelated to the original complaint, it is handled and processed as a new discrimination complaint.

iv) Processing Amended Complaints. The investigator processes an amended complaint in the same manner as any original complaint. This means the investigator will provide all parties with a copy of the amended complaint, document the notification in the casefile, and afford the respondent(s) an opportunity to respond. Investigators must review every amendment to ensure a *prima facie* allegation is present.

v) Amended vs New Complaint. The mere fact the named parties are the same as those involved in a current or ongoing investigation does not necessarily mean new allegations should be considered an amendment. When the alleged retaliation involves a new or separate adverse action unrelated to the active investigation, the investigator will assign the complaint its own case number and process as a new case.

F) **Withdrawal of Complaint.**

i) Attempts by a complainant to withdraw a previously filed complaint will not necessarily result in termination of the commissioner's investigation. However, a voluntary, uncoerced, and written request from a complainant to withdraw the complaint is given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

ii) When a complaint is withdrawn, the complainant loses all appeal rights; therefore, written documentation is required for all complaints with a withdrawn status.

G) **Arbitration of Other Agency Proceedings.**

i) General.

- (a) An employee who files a complaint under KRS 338.121(3) may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. The complainant may concurrently resort to other agencies for relief such as the National Labor Relations Board. The commissioner's jurisdiction to entertain KRS 338.121(3) complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The commissioner may issue citations and penalties against any party violating the anti-discrimination statute regardless of the pendency of other proceedings.
 - (b) The commissioner may give due deference to the jurisdiction of other forums established to resolve disputes which may also be related to KRS 338.121 complaints.
 - (c) When a complainant pursues remedies other than those provided by KRS 338.121, but which are related to the complainant's KRS 338.121 complaints, the commissioner may defer to the results of such proceedings as outlined in "Postponement and deferral of the commissioner's determination."
- ii) Postponement and deferral of the commissioner's determination.
- (a) *Postponement.* The commissioner may postpone his or her determination where the rights asserted in other proceedings are substantially the same as rights under KRS Chapter 338 and those proceedings are not likely to violate the rights guaranteed by KRS 338.121. The factual issues in such proceedings must be substantially the same as those raised in the KRS 338.121 complaint.
 - (b) *Deferral to outcome of other proceedings.* The commissioner may make a determination to defer to the outcome of other proceedings initiated by a complainant on a case-by-case basis. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues; that the proceedings were fair, regular, and free of procedural infirmities; the forum hearing the matter must have the power to determine the ultimate issue of discrimination; and that the outcome of the proceedings was not contrary to the purpose and policy of KRS Chapter 338. When such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the discrimination complaint.
 - (c) *Effect of grievance procedure on investigation.* The investigator must do the following when he or she received a discrimination complaint that is the subject of a labor/management grievance procedure:
 - (1) Document the alleged discrimination charge from the complainant, including the names, addresses and telephone number of the employer, as well as the labor organization representing the complainant in the grievance procedures.
 - (2) Inform the employer an employee has filed a discrimination charge against it and that this agency will not interfere with the grievance procedure as long as good faith is maintained in the grievance discussions.

- (3) In the event the preliminary investigation reveals undisputed facts, which clearly indicate a violation of KRS 338.121 or no violation of KRS 338.121, the commissioner must make a determination and advise all parties without deference to grievance procedures. However, the commissioner may defer to grievance or arbitration procedures when it is unclear whether there is a violation of KRS 338.121.
- (4) When the complainant is satisfied with the results of the grievance procedure, the case can be closed with appropriate notations in the file.
- (5) When the complainant is not satisfied with the results of the grievance procedure, the commissioner may pursue the complaint investigation and, when the case is meritorious and the remedies sought by the complainant are just and reasonable, the agency will issue citation(s) and penalty(ies).
- (6) When the commissioner is not satisfied that arbitration adequately served the purposes of KRS Chapter 338, the agency may pursue the case and seek remedies in-line with the statutes.

EXAMPLE: Employee waiver of the right to file safety and health complaints does not adequately serve the purposes of KRS Chapter 338.

- (d) *Walkaround Pay Disputes.* 803 KAR 2:092 recognizes the essential nature of employee participation on walkaround inspections under KRS 338.111. Employees must be able to freely exercise their statutory right to participate in walkarounds without fear of economic loss. An employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under KRS 338.121 and 803 KAR 2:092. When employees participate in other inspection-related activities, an employer's failure to pay employees for time engaged in these activities is discriminatory under KRS 338.121.
- (e) *Employee Refusal to Comply with Safety Rules.* Employees who refuse to comply with KY OSH standards or valid safety rules implemented by the employer in furtherance of KRS Chapter 338 are not exercising any rights afforded by KRS Chapter 338. KY OSH will not normally regard disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations as discriminatory action prohibited by KRS 338.121. This situation is distinguishable from refusals to work, as discussed above.

VIII) **Complaint Processing.**

A) **Receipt of Complaint.**

- i) Telephone and/or Walk-in. The discrimination investigator takes telephone and walk-in inquiries on the Discrimination Complaint Screening Form.
- ii) Written. KY OSH will accept a complaint in written form.

- iii) Date Complaint Received. The discrimination complaint is filed on the date received. When a complainant makes an oral complaint to KY OSH and then files a written complaint, the date the oral notification is received is the date the complaint was made.
- iv) Screening. The investigator and/or additional discrimination administrative staff screens complaints to determine whether they are eligible for investigation. Complaints are ineligible for investigation when they do not involve activity protected under KRS Chapter 338, are not timely filed, or are not otherwise under KY OSH jurisdiction. The supervisor notifies the complainant in writing, when the complaint is ineligible for investigation.

NOTE. When KY OSH receives a complaint falling under the jurisdiction of another state or Federal agency, the investigator will forward that complaint to the appropriate agency.

- v) Logging the Complaint. The investigator assigns a case number and records the case on the discrimination log.

IX) Investigation Procedures

- A) **Preliminary Investigation.** Prior to contacting any party in the case, the investigator will check on prior or current discrimination, safety, and/or health compliance cases related either to the complainant or respondent. This enables the investigator to coordinate related investigations and to obtain additional background data pertinent to the case. Examples of information to be sought during the preliminary investigation phase are:

- i) Review of KY OSH safety or health complaints;
- ii) Safety and health citations;
- iii) Inspection reports;
- iv) Interviews and signed statements by the CSHO; and
- v) Information on any previous KY OSH discrimination investigations involving the current parties.

B) Notification.

- i) Respondent.
 - (a) Prior to notifying the respondent, the discrimination investigator checks to determine whether any safety and/or health compliance inspection is active at this location.
 - (b) 803 KAR 2:250 requires the commissioner to notify the respondent in writing within five (5) working days following receipt of the complaint that a discrimination complaint has been filed against it.
 - (c) The notification letter includes:

- (1) Establish identities and job titles of respondent's representative(s);
- (2) Establish the purpose of the opening conference;
- (3) Explain the investigative process (i.e. interview witnesses, take statements, collect evidence);
- (4) Explain the rights and limitations of both the complainant and the respondent;
- (5) Explain that when found in violation of KRS 338.121, the respondent may be subject to citation and penalty and any other action that will make the complainant whole;
- (6) Explain that settlement is always an option but now that KY OSH is involved, KY OSH and OGC must review any settlement to ensure the complainant's rights under KRS 338.121 are protected;
- (7) This notification will include a copy of the case activity worksheet summarizing the allegations, a Designation of Representative Form, and a copy of KRS 338.121;
- (8) The notification may also include a preservation of evidence request; and
- (9) The letter requests the respondent provide a Respondent Position Statement (RPS) containing a full and complete written account of the facts and supporting documentation regarding the alleged adverse action within ten (10) working days from date of receipt.

ii) Complainant.

- (a) *Follow-up Questionnaire.* Within five (5) working days of receiving a discrimination complaint, the investigator may send the complainant, via certified mail, return receipt requested, a Follow-up Questionnaire to complete and return. The complainant is notified his or her failure to complete and return this questionnaire within ten (10) working days of receipt may result in the complaint being closed. When the complainant does not return the completed form by the specified date, the investigator will send a second letter via certified U.S. mail reminding the complainant of the importance of returning the form and setting a final date. When the complainant does not return the completed form by that date, the investigator can close out the investigation and notify the complainant by certified letter.
- (b) *Designation of Representative Form.* This questionnaire includes a Designation of Representative Form, and a copy of KRS 338.121.

C) **Contacts.**

i) Respondent.

- (a) The respondent or respondent's representative may call the investigator to discuss the allegation or inquire about the investigative procedure. The investigator documents in the activity/telephone log or in a Memo to File the call and pertinent information.
- (b) When respondent's representative indicates that he/she represents the non-management witness, a signed Designation of Representative form should be completed by respondent's attorney memorializing that he/she represents the non-management witness.
- (c) When a telephone conversation with the respondent or its representative includes a significant amount of pertinent information, the investigator must document the substance of this contact in the casefile.
- (d) If at any time during the investigation, the respondent suggests the possibility of an early resolution to the matter, the investigator will immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded.

(e) *Uncooperative Respondent.*

- (1) The investigator may request subpoenas for witness interviews or records when a respondent is uncooperative. The OGC has the responsibility for drafting subpoenas and getting them signed. KY OSH has two types of subpoenas for use in discrimination investigation cases:
 - a. A subpoena *Ad Testificandum* is used to obtain an interview from a witness. Subpoenas *Ad Testificandum* must specify the means to document or record the interviews (such as whether a court reporter will be present).
 - b. A subpoena *Duces Tecum* is used to obtain documentary evidence.

NOTE. Both types of subpoenas can be served on the same party at the same time.

- (2) The secretary or authorized deputy can require the named party to appear at a designated office for production, at its cost.
- (3) When drafting subpoenas, the party should be given a short timeframe in which to comply, using broad language like "any and all documents" or "including but not limited to," and making the investigator responsible for delivery and completion of the subpoena. The investigator and the attorney drafting the subpoena will discuss respondent's response date.
- (4) When the respondent fails to cooperate or refuses to respond to the subpoena, the investigator will consult with the OGC regarding how best to proceed. One option is to evaluate the case and make a determination based on the information gathered during the investigation. The other option is to request the OGC enforce the subpoena.
- (5) When dealing with a nonresponsive or uncooperative respondent, the investigator will consult with the assistant director and/or OGC, to draft a letter informing the respondent of the possible consequences of failing to provide the requested information

in a timely manner. Specifically, the respondent is advised that its continued failure to cooperate with the investigation will lead KY OSH to reach a determination without the respondent's input. Additionally, the respondent is advised that KY OSH may draw an adverse inference against it based on its refusal to cooperate with specific investigative requests.

ii) Complainant.

- (a) The complainant or complainant's representative may call the investigator to discuss the allegation or inquire about the investigative procedure. The investigator documents in the activity/telephone log or in a Memo to File the call and pertinent information.
- (b) *Uncooperative Complainant.* The investigator takes the following steps in situations when he or she is having difficulty locating the complainant to initiate or continue the investigation:
 - (1) Telephone the complainant a variety of times during normal work hours and in the evening. All phone attempts to contact the complainant must be documented in the casefile;
 - (2) Email the complainant when his or her email is known. A copy of the email must be included in the casefile;
 - (3) Mail a letter via certified U.S. mail, return receipt requested, to the complainant's last known address, stating that the complainant must contact the investigator within ten (10) working days of the receipt of the letter or the case will be dismissed;
 - (4) When the complainant does not respond to the notification letter within ten (10) working days, KY OSH may terminate the investigation and dismiss the complaint. The investigator must retain proof of delivery of the letter in the file along with a copy of the letter.

D) Respondent Position Statement.

i) Respondent.

- (a) The respondent provides the investigator a written RPS, which may or may not include supporting documentation. Assertions made in the RPS do not constitute evidence and the investigator must still contact the respondent to interview all potential witnesses, review records, and obtain documentary evidence or to further test the respondent's stated defense.
- (b) Extensions are granted under extenuating circumstances. When the respondent requests a delay to provide documentation to support its action against the complainant, the investigator will inquire as to the nature of the delay. The employer should have documentation required to support its action against a complainant prior to taking any action. The investigator and supervisor will use professional judgment when a respondent requests an extension of time to provide the RPS. The investigator must evaluate the respondent's documentation it had when it took the action against the complainant.

- (c) The respondent may provide after-acquired evidence (evidence that the respondent discovered after it took action against the complainant that would otherwise have led to the same action taken) later in the investigation.
- (d) The investigator is not bound or limited to making initial contact with the respondent through any one individual or other designated representative. When the investigator receives a RPS from the respondent, further contact will be with the person who signed the RPS unless the respondent designates an alternate contact.

ii) Complainant.

- (a) The investigator sends the complainant a copy of the RPS by certified mail.
- (b) The complainant is given ten (10) working days to respond.
- (c) Extensions are granted under extenuating circumstances. When the complainant requests a delay to provide documentation to respond to the RPS, the investigator will inquire as to the nature of the delay and make a determination on granting the extension.
- (d) The investigator documents the extension request and determination in the casefile.

E) **Interviews.** The investigator must attempt to interview all individuals with involvement in or knowledge of the alleged retaliation.

i) In General.

- (a) The investigator must present credentials at the beginning of each interview.
- (b) To maintain confidentiality, avoid confusion, and avoid biased testimony, witnesses must be interviewed individually and in private.. Witnesses must be advised he/she may contact KY OSH when he/she believes he/she has been subjected to retaliation because he/she participated in a discrimination investigation.
- (c) The investigator must attempt to interview all witnesses identified by the complainant and respondent but is not limited to these individuals. The investigator must note all attempts to interview the witness(es) and the reason(s) no interview occurred. When witnesses appear to be rehearsed, intimidated, or reluctant to speak in the workplace, the investigator will obtain their names and contact information to attempt offsite interviews. The investigator will leave contact information with each witness.
- (d) When interviewing witnesses (other than officials representing the respondent), the investigator must specifically ask if the witness requests confidentiality. Confidentiality is documented whether audio recorded, written, or transcribed. When confidentiality is requested, the investigator must explain to potential witnesses their identity will be kept in confidence to the extent allowed by law, but if they are going to testify in a proceeding, the statement may need to be disclosed. Interview statements obtained from non-managers, including former employees or employees of employers not named in the complaint, must

be clearly marked in such a way as to prevent the unintentional disclosure of the confidential statement.

(e) Interview documentation is prioritized as follows:

(1) Audio Recordings. The investigator should record all interviews, unless specifically refused by the interviewee. When an interviewee refuses an audio recording, the investigator must document the refusal in work notes.

- a. The investigator must start the recording by stating his or her name, title, the date and time of the interview, the location of the interview, the interviewee, and any additional attendee(s).
- b. The investigator must get the interviewee's information, such as but not limited to, name, company position, length of employment, email address, home address, and phone number.
- c. At the conclusion of the interview, the investigator must state the interview is concluded and provide the time.

(2) Written Statements. Interview statements are normally be written in the first person. The wording of the statement must be understandable to the individual and reflect only information obtained in the interview.

- a. The individual should initial any changes or corrections; otherwise, the statement cannot be changed, added to or altered in any way.
- b. The statements must include language affirming the accuracy of the statement and include a space for the individual to initial and/or sign. The statements also include language regarding the statement's confidentiality and the option for the individual to waive confidentiality. The individual must sign and date the statement and the investigator must then sign it as a witness.
- c. When the individual refuses to sign the statement, the investigator must note such refusal on the statement.

(3) Handwritten notes. The investigator must transform his/her handwritten notes into a detailed, type written format.

ii) Respondent.

- (a) Interviews with management officials are scheduled through the respondent's attorney or the respondent. The respondent can request legal counsel attend management official interviews. Interviewing management or supervisory officials outside of the presence of counsel or other officials of the company may be necessary when the official has information helpful to the complainant and does not wish the respondent to know he or she

is speaking with the investigator. Under the circumstances, the investigator should interview the individual away from the premises.

- (b) The investigator will confirm that the respondent's attorney represents the witness. It must be clear to the witness:

- (1) Respondent's attorney represents respondent; and
- (2) The witness has the right to a private interview without the presence of respondent's attorney.

NOTE. If the witness requests that respondent's attorney be present, the interview may proceed.

iii) Complainant.

- (a) The investigator must attempt to interview the complainant in all cases as soon as possible.

- (1) When practical and possible, the investigator will conduct face-to-face interviews with complainants.
- (2) It is highly desirable to obtain a signed interview statement from the complainant during the interview.
- (3) The complainant may have an attorney or other personal representative present during the interview, so long as the investigator has obtained a signed "designation of representative" form.

- (b) The investigator must attempt to ascertain the restitution sought by the complainant.

- (1) When the respondent has discharged or laid off the complainant, the investigator must advise complainants of their obligation to seek other employment and to maintain records of interim earnings. Failure to do so could result in a reduction in the amount of back pay to which the complainant might be entitled in the event of settlement, issuance of a citation, or litigation.
- (2) The investigator must advise the complainant that the respondent's back pay liability ordinarily ceases when the complainant refuses a bona fide, unconditional offer of reinstatement.
- (3) The investigator must request the complainant retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

iv) Additional Witnesses.

- (a) When the complainant is covered by a collective bargaining agreement, the investigator must interview relevant union officials and obtain copies of grievance proceedings or arbitration decisions related to the retaliation case in question.
- (b) The respondent's attorney does not have the right to be present during interviews of non-management employees. Any witness may request a personal representative or attorney present at any time.
- (c) When the non-management or non-supervisory employee witness requests that respondent's attorney be present, the investigator will ask respondent's attorney who he/she represents and specifically ask respondent's attorney whether he/she represents the non-management witness in the matter. The investigator will document the response.

F) Onsite Visit.

- i) While not all discrimination investigations involve onsite visits, the investigator conducts personal interviews and collects documentary evidence on-site whenever practicable.
- ii) Site visits are planned in such a manner as to personally interview all appropriate witnesses during a single site visit when possible.
- iii) When the investigator arrives at a job site, he/she will present credentials and give a business card to the respondent's representative(s).
- iv) The investigator meets with the respondent's representatives and explains the purpose and scope of his/her visit.
- v) At the supervisor's discretion, and in consultation with the OGC, it may be necessary to transcribe electronic recordings used as evidence in merit cases. All recordings are government records and must be included in the casefile.

G) Closing Conferences.

- i) The investigator conducts separate closing conferences with the complainant and respondent and follows up with a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation).
- ii) The basic information provided during the closing conferences with the complainant and the respondent is the same.
 - (a) The investigator discusses the findings, allowing time for questions and explaining how the recommended determination was reached.
 - (b) The investigator informs the complainant and respondent when a citation and penalty may be recommended.
 - (c) The investigator informs the complainant and the respondent of their appeal rights as well as the time limitation for filing the appeal.

- (d) The investigator informs the complainant and the respondent about the open records process.
- (e) When the complainant or respondent cannot be reached in order to conduct a closing conference, the investigator sends a letter via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation) explaining the findings. The findings at this stage are recommendations subject to review and approval by the supervisor. This letter invites the complainant and respondent to contact the investigator within ten (10) working days of receipt to discuss the preliminary investigative findings.
- (f) The closing conferences with the complainant and the respondent are documented in the casefile.

H) Documenting the Investigation.

- i) Each casefile must contain a chronological diary of the investigation. Site visits, exchange of documents, letters, communications, etc. are recorded in the casefile.
- ii) The investigator will make every effort to obtain copies of, or at least review and document in a Memo to File, all pertinent data and documentary evidence respondent offers and the investigator construes as being relevant to the case.
- iii) The investigator must attempt to obtain copies of appropriate records and other pertinent documentary materials as required. Such records may include, but not be limited to,
 - (a) Safety and health inspections;
 - (b) Records of inspections conducted by other enforcement agencies;
 - (c) Copies of any termination notices, reprimands, warnings or personnel actions;
 - (d) Performance appraisals;
 - (e) Earnings and benefits statements;
 - (f) Grievances;
 - (g) Unemployment benefits, claims, and determinations;
 - (h) Job position descriptions;
 - (i) Company employee and policy handbooks;
 - (j) Copies of any charges or claims filed with other agencies;
 - (k) Collective bargaining agreements;
 - (l) Arbitration agreements; and

(m) Medical records.

- iv) When it is not possible to get copies, the investigator should 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.

I) Protected Documents.

i) Trade Secret.

(a) The investigator must be aware of the possibility of trade secret documents coming into the investigator's possession. It is the complainant and respondent responsibility to identify any trade secrets. If trade secrets are identified, the investigator will explain the KY OSH Program is required by law to preserve the confidentiality of all information which might reveal a trade secret in accordance with 803 KAR 2:095.

(b) Any document, photo, video, or other recordings the investigator obtains that the respondent alleges is trade secret must be prominently identified on the document itself or the electronic file name as an alleged trade secret. Trade secret documents may include, but are not limited to, contracts, client/customer lists, schematics, programs, patent applications, research, etc.

- ii) Confidential business information. The investigator must be aware of the possibility of confidential business documents coming into the investigator's possession. Any document the investigator obtains during the investigation which the respondent alleges is confidential will be prominently identified on the document itself or the electronic file name as an alleged confidential business document.

EXAMPLE: Confidential business documents may include, but are not limited to, business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information on financial condition.

J) Final Investigative Report (FIR). The FIR is KY OSH's internal summary of the investigation

- i) The FIR includes citations to specific exhibits in the casefile as well as other information necessary to facilitate supervisory review of the casefile.

(a) Information Required in the FIR

(1) Date the investigator gives the FIR to the supervisor;

(2) The subject [company name], [case number];

(3) Complainant's and respondent's name, address, phone numbers, email, and whether each was represented. When represented, the same information is included for any representative.

(4) Timeliness of the discrimination complaint (filed within the regulatory period);

NOTE. When documenting timeliness, the date of the alleged incident and the date the discrimination complaint was filed should be clearly noted.

- (5) Jurisdiction. Give a brief statement of the basis for coverage and a basic description of the company to include location of main offices and nature of primary business. Summarize the information that brings the case under KRS Chapter 338. Jurisdictional issues are addressed here.
- (6) Protected Activity. Explain the protected activity being investigated;
- (7) Respondent Knowledge. Note whether or not the respondent had knowledge of the protected activity and the type of knowledge the respondent had;
- (8) The complainant's allegations. When multiple allegations are present, each allegation is addressed.
- (9) A brief account of the respondent's defense.
- (10) Factual Analysis. Detailed analysis establishing activity protected by KRS 338.121, the respondent's knowledge of the complainant's protected activity, adverse action, and nexus.
- (11) Recommended Determination. Recommendation whether or not to issue a citation.

NOTE. The investigator will attach and number each exhibit in the casefile; the exhibit number will be listed in the appropriate section on the FIR.

- (b) The FIR must be signed by the investigator and the supervisor.

X) **Essential Elements of a Violation.**

A) **Elements of a Merit Case.**

- i) **Essential Elements.** There are four (4) essential elements of a merit case. During all phases of the investigation, the investigator must look for protected activity, knowledge, causal connection, and reprisal. The four (4) required elements are:
 - (a) The complainant engaged in an activity protected by KRS Chapter 338;
 - (b) The employer had knowledge of this protected activity;
 - (c) The complainant suffered adverse action; and
 - (d) Nexus (reasonable cause to believe there is a causal link between the activity protected under KRS Chapter 338 and the adverse action).
- ii) **Developing Essential Elements.** To develop these essential elements, the investigator must:
 - (a) Evaluate the complainant's allegations;

- (b) Corroborate or disprove the allegations through witnesses and other evidence;
- (c) Evaluate the respondent's answer to the allegations and affirmative defenses;
- (d) Corroborate or disprove the respondent's response through witnesses and other evidence;
- (e) Evaluate the complainant's answer to any affirmative defense; and
- (f) Evaluate the complainant's answer to attempt to resolve discrepancies.

B) Activity Protected under KRS Chapter 338.

- i) The evidence must establish the complainant engaged in activity protected by KRS Chapter 338. However, with the exception of certain cases involving refusals to work, it is not necessary to prove the referenced statute(s) were actually violated.
- ii) Protected activity generally falls into four (4) broad categories:
 - (a) Providing information to a governmental agency or the complainant's supervisor;
 - (b) Filing a complaint, or instituting a proceeding provided for by KRS Chapter 338, with the commissioner or his agent;
 - (c) Participating in KY OSH inspections, testifying, or preparing to testify, in proceedings before the Review Commission; or
 - (d) Refusing to perform an assigned task. Generally, a worker may refuse to perform an assigned task when he or she has a good faith, reasonable belief that working conditions are unsafe or unhealthful, and he or she does not receive an adequate explanation from a responsible official that the conditions are safe.

C) Employer Knowledge.

- i) Actual Knowledge. The person(s) involved in the decision to take the adverse action was aware or suspected the complainant engaged in activity protected under KRS Chapter 338.

EXAMPLE: One of the respondent's managers need not have specific knowledge that the complainant contacted a regulatory agency when his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant.

NOTE. The investigation need not show that the person who made the decision to take the adverse action had knowledge of the activity protected under KRS Chapter 338, only that someone who provided input that led to the decision had knowledge of the activity protected under KRS Chapter 338.

- ii) Inferred Knowledge. When the respondent does not have actual knowledge, but could reasonably deduce the complainant filed a complaint.

EXAMPLE: Inferred knowledge includes, but is not limited to:

- A KY OSH complaint involves the only lathe in a plant, and the complainant is the only lathe operator.
- A complaint involves unguarded machinery and the complainant was recently injured on an unguarded machine.
- A union grievance filed over a lack of fall protection and the complainant had recently insisted that his foreman provide him with a safety harness.
- Under the *small plant doctrine*, in a small company or small work group where everyone knows each other, knowledge can also be attributed to the employer.

D) **Adverse Action.** The evidence must demonstrate the complainant suffered some form of adverse action initiated by the respondent. An adverse action may occur at work, or, in certain circumstances, outside of work.

i) Adverse actions may include, but are not limited to:

- (a) Discharge.
- (b) Demotion.
- (c) Reprimand or counseling statement. An administrative warning, either written or verbal, issued by an employer to an employee.
- (d) Negative performance rating.
- (e) Suspension.
- (f) Harassment. Unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
- (g) Hostile work environment. Separate adverse actions may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person.
- (h) Lay-off.
- (i) Failure to hire.
- (j) Failure to promote.
- (k) Blacklisting.

- (l) Failure to recall after lay-off or work stoppage.
 - (m) Transfer to different job.
 - (n) Change in duties or responsibilities.
 - (o) Denial of overtime.
 - (p) Reduction in pay.
 - (q) Denial or loss of benefits.
 - (r) Making a threat.
 - (s) Intimidation.
 - (t) Failure to train.
 - (u) Constructive discharge. The employer *deliberately* created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign. It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as “adverse” in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action “materially adverse.” Specifically, the evidence must show the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation.
- ii) The investigator can test for material adversity by interviewing co-workers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in activity protected under KRS Chapter 338.

E) **Nexus.**

- i) There must be reasonable cause to believe there is a causal link between the activity protected under KRS Chapter 338 and the adverse action. That causal link will be either:
- (a) The adverse action would not have occurred **but for** the activity protected under KRS Chapter 338;
 - (b) The activity protected under KRS Chapter 338 was a **contributing factor** in the adverse action; or
 - (c) The activity protected under KRS Chapter 338 was a **motivating factor** in the adverse action.
- ii) Nexus can be demonstrated by direct or circumstantial evidence, such as timing of action (proximity in time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees or in comparison to

how the complainant was treated prior to engaging in protected activity, and/or animus (ill will towards safety or the complainant).

(a) *Timing of Action.*

- (1) Timing of action considers how soon the alleged retaliatory action(s) occurred in relation to the activity protected by KRS Chapter 338. Timelines are critical in evaluating whether, and when, the activity protected by KRS Chapter 338 preceded the alleged retaliatory action.
- (2) The investigator should always develop a timeline of the events leading up to the alleged adverse action and include it in the FIR. Some timelines may encompass days or months while others, only minutes. These timelines aid the investigator and the supervisor in determining whether a causal link between the activity protected under KRS Chapter 338 and the adverse action exists.

(b) *Disparate Treatment.* Disparate treatment involves how the respondent treated other similarly situated employees who engaged in similar conduct which respondent claims is the legitimate non-discriminatory reason for the adverse action. A review of personnel file is appropriate to obtain this information. The investigator must obtain documents that support or negate disparate treatment such as, but not limited to, time cards and disciplinary records.

(c) *Animus.* Animus involves the respondent's attitude toward workplace safety and health in general and those who bring workplace safety and health concerns to the respondent's attention. Animus is frequently the most difficult element to analyze. The investigator considers factors such as, but not limited to, the respondent's safety and health programs, training, whether the respondent has a method by which employees can report safety and health concerns, near miss investigations, remedial actions, site inspections, and the respondent's record on correcting safety and health concerns brought to its attention. The investigator must also evaluate the respondent's attitude toward the complainant.

iii) Questions that will assist the investigator in evaluating the respondent's position include:

- (a) Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- (b) Did the complainant's productivity, attitude, or actions change after the activity?
- (c) Did the respondent discipline other employees for the same infraction and to the same degree?

iv) To establish a violation of KRS 338.121(3), the employee's engagement in activity protected under KRS Chapter 338 need not be the respondent's sole motivation behind discharge or other adverse action. Ultimately, the issue as to whether a discharge was due to activity protected under KRS 338.121 must be determined on the basis of the facts in each case.

- v) The supervisor will coordinate witness interviews when the investigator determines assistance may be required or to obtain evidence at a distant location.

XI) **Disposition of the Case.** Upon completion of the investigation, the supervisor and the investigator(s) will review the casefile. Absent extenuating circumstances the determination must be issued within 90 days of receipt of the complaint as per 803 KAR 2:250(6)(1). All extenuating circumstances delaying the determination must be documented in the casefile.

A) **Lack of Participation.** The commissioner may dismiss a complaint for the complainant's failure to cooperate.

B) **Administrative Closure.** Prior to administratively closing an investigation due to an untimely filed complaint, lack of jurisdiction, or early settlement, the investigator must include all information obtained and document the reasons for administrative closure in the casefile.

C) **Violation not established.**

- i) When it is determined the case lacks merit, the complainant declines to cooperate, a violation cannot be substantiated, the complaint is untimely, etc., the supervisor will dismiss the case.
- ii) The investigator notifies the complainant in writing via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation) the case has been dismissed. The dismissal letter must contain the reasons for the dismissal.
- iii) A separate letter notifying the respondent of the complaint dismissal is sent via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation). The letter to the respondent states the complaint has been dismissed subject to appeal by the complainant or may contain a more detailed explanation of the reasons for the dismissal action.
- iv) Copies of the dismissal letters to the complainant and the respondent must be part of the casefile.

D) **Violation identified.** When the supervisor determines the respondent has violated KRS 338.121(3), he or she will issue a citation with a penalty to the respondent.

- i) Persons who discriminate against employees due to the employees' participation in job safety and health activities may be cited for violating KRS 338.121.
 - (a) The citation includes a monetary penalty with a maximum penalty of \$10,000 for each violation.
 - (b) The citation may require such actions as reinstatement of the employees to their previous positions with full seniority, benefits, back pay, and clear work records to make the discriminated employee(s) whole.
 - (c) The secretary may order the immediate reinstatement of the employee pending the outcome of litigation.

E) Citations.

- i) When the supervisor determines a respondent has violated the discrimination provision of KRS Chapter 338, a citation with a penalty is issued. 803 KAR 2:250 requires the commissioner to make a determination within ninety (90) days following receipt of the complaint.
- ii) 803 KAR 2:120 Section 2 requires citations, “describe with particularity the nature of the alleged violation, including a reference to the provision(s) of KRS Chapter 338, standard, rule, administrative regulation, or order alleged to have been violated. Any citation must also fix a reasonable time or times for the abatement of the alleged violation.”
- iii) 803 KAR 2:120 Section 5 requires every citation to state that the issuance of a citation does not constitute a finding that a violation of KRS Chapter 338 has occurred unless there is a failure to contest as provided for in KRS Chapter 338 or, when contested, unless the citation is affirmed by the review commission.
- iv) 803 KAR 2:125 contains the posting requirements for KY OSH citations. Each citation is to remain posted for three (3) days or until the violation is corrected, whichever is longer. The respondent is required to post any notice of contest in the same area as the citation. The respondent’s failure to post the citation and/or the notice of contest are subject to a \$100 penalty pursuant to KRS 338.991.
- v) Citation and Notification of Penalty (KY-OSH-2D) is used to notify respondents of violations of KRS 338.121.

F) Abatement of Apparent Violations Form. KY OSH discrimination violations are accompanied by an Abatement of Apparent Violations Form for the respondent to complete and return to KY OSH. All abatement documentation must be signed and dated by the top management official at the facility.

- i) Discrimination violations are referenced as KRS 338.121(3)(a). Multiple alleged violation descriptions must clearly state all of the necessary elements violated.
- ii) In describing a discrimination violation it is necessary to identify the employee(s) discriminated against, the right(s) protected under KRS Chapter 338 which the employee(s) exercised and which lead to the discrimination (filed OSH complaint, spoke to CSHO, etc.), the form of discrimination (discharge, demotion, reprimand, etc.), and the date of the violation. The form of discrimination must be as specific as possible ("harassment in the form of being singled out for time studies," or "demoted from principal secretary to chief secretary, or "discharged from position of lineman, first class, etc.).
- iii) In discrimination citations, immediate abatement is sought. When it is desirable to have a longer abatement period, either a specific date or time period for abatement is used.
- iv) Discrimination citations must include a penalty.

G) Settlement

- i) Voluntary resolution of disputes is desirable and investigators are encouraged to actively assist the parties in reaching an agreement, where possible. Ideally, these settlements are reached solely through the utilization of KY OSH's standard settlement agreement. The language of this agreement generally is not altered, but certain sections may be included or removed to fit the circumstances of the complaint or the stage of the investigation.

The investigator uses judgment whether to involve the supervisor in settlement discussions. The investigator obtains the supervisor's and OGC's approval of the settlement agreement language prior to the parties signing the agreement. The supervisor's signature on both the settlement agreement and the FIR signifies his or her approval. The investigator issues appropriate letters to the parties forwarding copies of the signed settlement agreement, posters, the Notice to Employees, the back pay check, or any other relevant documents.

- ii) While a case is open, any settlement of the underlying claims reached between the parties must be reviewed by KY OSH and OGC to ensure the settlement is just, reasonable, and in the public interest. At the investigation stage, KY OSH fulfills this requirement through its review of the agreement. KY OSH must retain a copy of the reviewed agreement in the casefile. When KY OSH is unable to obtain a copy of the settlement agreement, KY OSH must reach a determination on the merits of the complaint, based on the evidence obtained. Investigators make every effort to explain this process to the parties early in the investigation to ensure they understand KY OSH's involvement in any resolution reached after a complaint has been initiated.

XII) Penalties.

A) Penalty Calculation.

- i) The penalty for each discriminatory act in violation of KRS 338.121 is \$10,000 except in circumstances determined by the commissioner or designee.
- ii) KY OSH does not adjust penalties, except in rare circumstances, for size, good faith, gravity, history, and where justice so requires. Any reduction requires approval of the commissioner or designee.
- iii) The table below serves as a guide for penalty assessment.

Oral reprimand	\$1,000
Written reprimand or other negative action in personnel file	
Loss of pay or benefits	\$2,000
Suspension	
Demotion	
Harassment	\$4,000
Discharge or lay-off	\$6,000.00
Multiple adverse actions	Cumulative up to \$10,000
Other forms of discrimination not covered	Up to \$10,000

- iv) The following criteria apply in those rare circumstances when a penalty is adjusted. Any reduction requires approval of the commissioner or designee and must be documented in the casefile.

(a) Size. Size is based on the maximum number of employees at all workplaces nationwide at any one time during the previous twelve (12) months. If utilized, a size reduction is applied as follows.

EMPLOYEES	REDUCTION
1-25	50%
26-100	30%
101-250	10%
251 or more	0%

(b) Good Faith. If an employer acted in good faith and there are extenuating circumstances surrounding the adverse activity, a reduction up to 25% may be given.

(c) History. If utilized, a history reduction is applied as follows.

(1) A 10% reduction may be applied when an employer has been investigated and not cited for discrimination within the past five (5) years.

(2) A 10% increase may be applied when an employer has been investigated and cited for discrimination within the past five (5) calendar years.

(3) No reduction or increase applies when an employer has not been investigated within the past five (5) years.

- v) A penalty up to \$10,000 may be assessed if the commissioner finds it necessary to achieve the maximum deterrent effect.

- vi) (a) An employer who willfully or repeatedly violates KRS 338.121 may be assessed a penalty up to \$70,000, but not less than \$5,000.

(b) If a willful citation is recommended, the Office of General Counsel must be consulted prior to issuance.

B) Collection and Recovery of Penalties.

- i) Time allowed for payment of penalties.

(a) *Uncontested penalties* – When a citation(s) and/or proposed penalty are uncontested, the penalty is due and payable immediately after the lapse of 15 working days following receipt of the appropriate penalty notice.

(b) *Contest of specific items and / or penalties* - When citation(s) and/or proposed penalties are contested, the penalty is not due and payable until final adjudication.

(c) *Penalty Payment/Collection* - See Chapter VIII.

XIII) **Appeal Rights.** 803 KAR 2:250 Section 7 gives employers the right to appeal or contest discrimination citations and penalties before the Review Commission.

A) Respondent.

- i) The employer has 15 working days from the date it receives a Citation and Notification of Penalty to notify the commissioner that it requests an informal conference or intends to contest the citation, penalty, and/or abatement.
- ii) The commissioner has 7 days to forward the citation, proposed penalty, and the notice of contest to the Review Commission.
- iii) The Review Commission may hold a hearing before a hearing officer.
- iv) The Review Commission is authorized to rule on appeals from citations and to order all appropriate relief including rehiring and reinstatement with back pay, etc. During litigation, the secretary may order reinstatement of employees pending the decision of the Review Commission.

B) Complainant.

- i) When the commissioner has notified the complainant in writing that no discriminatory action has been determined, the complainant may petition the secretary for a review of the commissioner's determination.
- ii) The petition must be in writing and state the reason the complainant is requesting review.
- iii) The secretary affirms the commissioner's determination or remands the case to the commissioner for further investigation.

XIV) **Follow-up Inspection.**

- A) The supervisor may assign a follow-up discrimination inspection to confirm whether the respondent has complied with a final order.
- B) The supervisor must assign a follow-up discrimination inspection under the following circumstances:
 - i) The complainant has informed KY OSH the respondent has not complied with the final order; or,
 - ii) The respondent has not provided documentation to KY OSH it has complied with the final order.