Weighing the Evidence
SOP# 900

Employment Discrimination Bureau
North Carolina Department of Labor

Procedure approved by: Tiffany Lathan, Bureau Chief

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STANDARD OPERATING PROCEDURE MANUAL

1. PURPOSE and SCOPE

1.1. Purpose

This SOP establishes the procedure used to make a determination pertaining to merit in a REDA investigation. This procedure has the following goal(s):

- To ensure that the elements of a REDA violation have been established and if not, that the case is closed for lack of merit;
- To ensure that the Respondent's defenses are evaluated properly;
- To ensure that the burden of proof is met and the evidence is weighed appropriately.

1.2. Scope

This SOP outlines the necessary steps in determining the merit of a Complainant's allegation. The investigator must determine whether the four elements of a REDA violation have been met and whether the Respondent's defenses defeat Complainant's allegation/s. For Occupational Safety & Health (OSH) cases, also refer to the OSH Discrimination Manual for specific OSH procedures.

1.3. Regulations

The following statutes, rules and/or codes must be followed while performing this SOP (click the links for the most up-to-date rules and laws):

1.3.1. Article 21 of NCGS 95 (NCGS §95-240, et al); and

1.3.2. DOL Record Retention Policy

2. PERSONNEL RESPONSIBILITIES

The following is a list of people who participate in the procedure and the overall responsibilities of each role.

Role	Responsibilities
Investigator	• To consider the evidence gathered to address the four elements of a REDA violation; • To weigh the evidence and carefully consider all proffered Respondent defenses.

3. HEALTH AND SAFETY ISSUES

Refer to the *Employee Safety and Health Program Policies*, the *Employee Safety and Health Manual*, and the *Employee Safety Rules* on the DOL Intranet for information related to safety matters affecting EDB personnel. For information related to the Americans with Disabilities

Act, refer to the ADA Checklist on the Intranet as well. To access these policies and checklists, click on the links above or visit the DOL Intranet *Safety and Health Program* and the EDB *Standard Operating Procedures* pages.

4. PROCEDURE

4.1. Trigger

This procedure is triggered once the investigation has been conducted and all evidence has been gathered.

4.2. Primary Procedure

4.2.1. The investigator shall decide if the Complainant has met the burden of proof, establishing that the four elements have been met.

a. Protected Activity: The Complainant must have engaged in a protected activity, such as complaining about his pay to management or the DOL.

i. Note that a true violation of the laws listed in NCGS §95-241a is *not* a requirement for a protected activity. For example, a person who reports a perceived pay shortage to his supervisor may not be fired for expressing concerns, even if there is no real shortage in the person's check. It is the *act of reporting the concern* that makes it a protected activity under NCGS §95-241.

b. Knowledge: The Respondent must have been aware of Complainant's protected activity.

i. Knowledge may be established when Respondent had reason to suspect that Complainant participated in the protected activity ("small shop theory" / "small plant doctrine").

ii. The primary decision maker is not required to have direct knowledge of the protected activity, as long as someone who provided input in Respondent's decision had knowledge of the protected activity.

c. Adverse Employment Action: An adverse employment action must have occurred / happened to the Complainant, such as termination, demotion, etc.

i. Harassment, bad performance evaluations, and reprimands are not typically considered to be adverse employment actions.

d. Causal Relationship: A causal connection must exist between the protected activity and the adverse employment action. When determining causal connection, the investigator should consider:

i. Whether Respondent exhibited animus (ill will) toward the Complainant or protected activity;

ii. The timing between the protected activity and the adverse employment action (more than 2 or 3 months *may* sever the causal connection);

iii. Whether similarly situated employees were treated the same; and

iv. The presence of false testimony or evidence.

4.2.2. If the Complainant has not met the burden of proof by proving the first *three* elements, the case will be closed as having no-merit and the investigator shall proceed to SOP# 1000 and draft a no-merit report of investigation.

4.2.3. If the Complainant has met the burden of proof on the elements, then the investigator must consider whether the Respondent has offered a *legitimate, non-discriminatory reason* (LNR) for the actions against the Complainant. An example of a LNR would be proven poor attendance or poor performance. This explanation from Respondent *should not be taken merely on its face*, but instead Respondent must provide evidence to support the LNR. A LNR may break the causal connection necessary to prove the fourth element of a REDA violation.

4.2.4. If Respondent has established a LNR for its actions, then the Complainant will be required to show that Respondent's reasons for the adverse employment action are a pretext and insufficient.

a. "Pretext" essentially means that Respondent's LNR was an attempt to conceal the true purpose of the adverse employment action.

4.2.5. If Respondent *cannot establish a LNR,* or if the Complainant *shows pretext,* then there is merit to the case. If so, proceed to SOP# 1000 and draft a merit report of investigation.

4.2.6. If the Respondent *establishes a LNR* and Complainant *cannot show pretext,* then there is no merit to the case. If so, proceed to SOP# 1000 and draft a no-merit report of investigation.

4.2.7. If Respondent acted against Complainant for both retaliatory *and* legitimate reasons, then it must be determined whether Respondent would have taken the same action even if the Complainant had *not* engaged in the protected activity.

a. If Respondent would have made the same decision in the absence of the protected activity, there is no merit to the complaint. If so, proceed to SOP# 1000 and draft a no-merit report of investigation.

b. If the Respondent would not have acted the same in the absence the protected activity, then the complaint is meritorious. If so, proceed to SOP# 1000 and draft a merit report of investigation.

4.2.8. Throughout this decision process, the investigator may need to return to the investigative process to obtain additional evidence as necessary via interview or evidence submission.

4.3. Alternative Procedures – N/A

4.4. Exception Procedures -- Protected Activity and Respondent Knowledge as Defined in 4.2.1. a and b.

4.4.1. In some circumstance, the Complainant does not have to be the person who engaged in the alleged protected activity. If it can be proven that Respondent had reason to believe the Complainant participated in a protected act, then the "protected activity" and "knowledge" elements are established under REDA. Example scenario: Complainant's coworker calls the DOL to report that the employees did not receive their checks this week, and word spreads that someone called the "labor board." Management overhears the rumor, assumes that Complainant called, and fires Complainant. In this example, the Complainant may still be protected under REDA even though the Complainant did not actually engage directly in any protected activity.

5. CUSTOMER SERVICE REQUIREMENTS - N/A

6. DATA AND RECORD MANAGEMENT

6.1. Record Retention

6.1.1. All records must be retained in the file and may not be destroyed, per the DOL Retention Policy. Records include, but are not limited to, complaint forms, questionnaires, emails, any evidence submitted by the Complainant or Respondent, the activity log, notes, and letters to the parties.

7. Exhibits – N/A