

this section, he or she may, upon written notice to the appropriate adjudicatory body and the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ will issue appropriate orders to regulate the course of future proceedings.

(3) Copies of documents in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, as well as all other parties. In all cases in which the Assistant Secretary is participating in the proceeding, copies of documents must also be sent to the Associate Solicitor for Occupational Safety and Health.

(b) The Federal Motor Carrier Safety Administration, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at its discretion. At the request of the Federal Motor Carrier Safety Administration, copies of all pleadings in a case must be sent to that agency, whether or not that agency is participating in the proceeding.

§ 1978.109 Decision and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity, or, in circumstances covered by the Act, the perception of protected activity, was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity or the perception thereof.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation

pursuant to § 1978.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the order must order the respondent to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to his or her former position, together with the compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor for Occupational Safety and Health. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. For ALJ decisions issued on or after the effective date of these rules, all other portions of the ALJ's order will be effective ten business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB).

§ 1978.110 Decision and orders of the Administrative Review Board.

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of