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Opinion No. 03-115

TOSHA's Jurisdiction Under Tenn. Code Ann. § 50-3-409 in Discrimination Complaints Brought by an Employee of a State Department or Agency

QUESTIONS

1. Whether the Tennessee Occupational Safety and Health Administration (TOSHA) has jurisdiction to investigate allegations of discrimination by an employee of a state department or agency under Tenn. Code Ann. § 50-3-409?

2. What actions may TOSHA take in response to a complaint of discrimination under Tenn. Code Ann. § 50-3-409 by an employee of a state agency or department?

OPINIONS

1. No, it is our opinion that TOSHA lacks jurisdiction to investigate such a complaint unless the state department or agency where the complaining employee works has entered into an agreement with the Commissioner of the Department of Labor and Workforce Development (Commissioner) pursuant to Tenn. Code Ann. § 50-3-906(5) to allow such an investigation.

2. The Commissioner may issue written notification of noncompliance with the Tennessee Occupational Safety and Health Act to the head of the state department or agency which is the employer, and ultimately issue this notification to the governor.

ANALYSIS

1. The Commissioner of the Department of Labor and Workforce Development (Department) is charged with the responsibility of investigating alleged discriminatory violations of the Tennessee Occupational Safety and Health Act (the "Act") by employers pursuant to Tenn. Code Ann. § 50-3-409 (1999 Repl.) However, state government departments and agencies are not considered "employers" under the Act.

The Act defines an employer as "a person engaged in a business who has one (1) or more employees and includes county, metropolitan and municipal governments." Tenn. Code Ann. § 50-3-103(8) (1999 Repl.) Since state governments are not included in the definition of employer, TOSHA lacks jurisdiction to investigate and prosecute complaints under the Act against state departments and agencies, unless otherwise provided in the Act. *See* Op. Tenn. Att'y Gen. No. 85-112 (opining that where a local government has developed its own program of compliance with TOSHA, the Department does not have jurisdiction to investigate and prosecute complaints filed against that government).

However, Tenn. Code Ann. § 50-3-906 provides in pertinent part: "The head of each agency shall . . . [b]y agreement with the commissioner devise a program of inspection and sanctions required to carry out the purposes of this chapter." Tenn. Code Ann. § 50-3-906(5) (1999 Repl.) This allows state departments and agencies to enter agreements as to whether and how investigations by TOSHA should proceed, and what, if any, sanctions should be imposed by agreement.

Accordingly, it is this office's opinion that TOSHA has no statutory authority to investigate or prosecute a complaint of discrimination by an employee of a state government department or agency pursuant to Tenn. Code Ann. § 50-3-409, but such agencies may enter into agreements with the Department allowing for investigations and sanctions.

2. State departments and agencies have certain responsibilities under the Act, such as establishing and maintaining "an effective and comprehensive occupational safety and health program consistent with the standards under [Chapter 3]." Tenn. Code Ann. § 50-3-906 (1999 Repl.) Whenever the Commissioner "has reason to believe that an agency or department is failing to reasonably abide by the provisions of §§ 50-3-906--913, the commissioner may issue to the head of such agency or department a written notification stating in what respects the agency or department has not adequately met its responsibilities." Tenn. Code Ann. § 50-3-908 (1999 Repl.) "If the agency or department does not advise the commissioner within twenty (20) days of its intention to contest such notification, the commissioner shall submit a copy of such notification to the governor, together with a request that such action be taken as will bring the agency or department into compliance with the provisions of this chapter." Tenn. Code Ann. § 50-3-908(b). If the agency or department contests the notification within the twenty (20) days, then the department or agency is afforded the opportunity to a hearing before the TOSHA Review Commission, which "shall thereafter issue to the governor its findings of fact and recommendations for action." Tenn. Code Ann. § 50-3-908(c).

Thus, the Commissioner may issue a written notification to the head of a state department or agency if the Commissioner has reason to believe that there is employment discrimination, which would not be "consistent with the standards under Chapter 3." As set forth above, this written notification may ultimately be sent to the governor.

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