

Everything You Were Afraid to Ask About Retaliation
Under the Occupational Safety and Health Act

Although many employers are well-aware of the citations and civil fines meted out by the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor ("DOL") pursuant to the Occupational Safety and Health Act (the "Act"), many employers have not been faced with the task of responding to a complaint by a disgruntled employee that the employer has discriminated against or retaliated against the employee for pursuing his rights under §11(c) of the Act. The purpose of this paper is to provide employers with information regarding how OSHA analyzes retaliation claims and how it investigates such claims upon receipt from a disgruntled employee. Foremost, employers should not take an OSHA retaliation claim lightly. OSHA investigators investigating retaliation claims are highly trained individuals with a lengthy record of service in enforcing the Act. They understand the Act and case law interpreting discrimination or retaliation under it. They tend to take their duties in investigating such claims seriously and conduct vigorous, intensive investigations.

§11(c)(1) of the Act provides:

"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 any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

§11(c)(2) of the Act provides:

"Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty (30) days after such violation occurs, file a complaint with the secretary alleging such discrimination. Upon receipt of such complaint, the secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation the secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate united states district court against any such person."

§11(c)(3) of the Act provides:

"Within ninety (90) days of the receipt of a complaint filed under this subsection, the secretary shall notify the complainant of his determination under Paragraph 2 of this subsection."

§11(c)(1) means an employer cannot retaliate against an employee for complaining to the union, OSHA or the company about job safety and health. It cannot retaliate against an employee for participating in OSHA inspections or OSHA-related activities. A complaint would be an employee's request for an inspection, a complaint made to state agencies or other federal agencies about safety and health conditions and complaints to the employer.

§11(c)(1) is broadly interpreted by OSHA and the courts. No matter how silly the complaint might be, OSHA will notify the employer and if the employer fails to provide a reasonable explanation for the adverse employment action complained about by the employee, it will conduct a full investigation.

What Does OSHA Look For?

OSHA at all times focuses on the employer's motivation or intention with regard to an adverse employment action under §11(c). The employer must prove that it would have done the same thing even in the absence of protected activity.

Employees may not be protected from refusing to perform duties even if they voice concerns about unsafe working conditions. To be a protected activity, the employee must be making a complaint in good faith and the employee must have reasonable grounds to believe he or she is exposed to an imminent danger. An imminent danger under OSHA means a situation that could lead to serious bodily injury or death. A prime example would be working in an unshored trench since a trench that is not shored or sloped properly could cave in, crushing and killing the employees.

An employee has a right to refuse to do a task and is protected if all of the following conditions are met:

- The employee has asked the employer to eliminate the danger and the employer has failed to do so.

- The employee may refuse to work in good faith, which means he or she must genuinely believe that an imminent danger exists. The employee's refusal cannot be a disguised attempt to harass his or her employer or disrupt business. The test is whether a reasonable person would agree that there is a real danger of death or serious injury and there is not enough time due to the urgency of the hazard to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

It would be retaliatory to terminate an employee if the employee asks the employer to correct the hazard, asks the employer for other work, tells the employer that he or she will not perform the work unless and until the hazard is corrected and the employee remains at the work site until ordered to leave by the employer.

If the complaint is frivolous, the employee can be disciplined for refusing to work. An employer has to look at this on a case-by-case basis and general rules are not applicable.

§11(c)(1) protects employees from discharge, demotion, taking away seniority or benefits, transfer to an undesirable job or shift or threats or harassment of the employee.

An employer can terminate or discipline an employee for a nondiscriminatory reason. However, to establish a violation, if a protected activity is part of the reason for discipline, the employer has violated §11(c)(1). This is decided on a case-by-case basis. Therefore, if any part of the reason for the employee's discharge is retaliatory, even though the employer might have an excellent reason for terminating the employee, the employer has violated the Act. If a 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, §11(c)(1) has been violated.

Conversely, employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by their employer are not exercising any rights afforded by the Act. Therefore, disciplinary measures taken by an employer solely in response to an employee's refusal to comply with appropriate safety rules and regulations will not ordinarily be regarded as discriminatory actions prohibited by §11(c)(1).

OSHA enforces whistleblower provisions involving not only the OSHA Act but:

1. The Surface Transportation Assistance Act of 1982;
2. The Asbestos Hazard Emergency Response Act of 1986;
3. The Internal Safety Container Act of 1977;
4. The Safe Drinking Water Act of 1974;
5. The Federal Water Pollution Control Act of 1972;
6. The Toxic Substances Control Act of 1976;
7. The Solid Waste Disposal Act of 1976;
8. The Clean Air Act of 1977;
9. The Comprehensive Environmental Response Compensation and Liability Act of 1980;
10. The Energy Reorganization Act of 1978;
11. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century;

12. The Pipeline Safety Improvement Act of 2002; and
13. Sarbanes Oxley.

These laws all have different time tables and may work somewhat differently from OSHA retaliation. However, it is important to know or recognize that OSHA enforces retaliation whistleblower protection under all of these statutes.

OSHA Internal Procedures

As soon as possible upon receipt of the complaint, information is reviewed for jurisdictional requirements, timeliness of filing and the presence of a *prima facie* allegation. Complaints which pass this initial screening are docketed for investigation. This means that an employer is notified in writing of OSHA's receipt of the complaint and intent to investigate.

Complaints that do not allege a *prima facie* allegation or are not filed within thirty (30) days will not be docketed or if the complainant refuses to accept the determination of lack of jurisdiction, the case will be docketed and dismissed with appeal rights.

As part of the docketing procedures, the supervisor will send a letter notifying the employer that the complaint has been reviewed, given an official case name and number and has been assigned to an investigator. Accompanying the letter will be a designation of representative form through which the employer can designate an attorney or other official representative and possibly a questionnaire requesting information previously provided by the complainant.

An investigation may be conducted outside of statutory time limits if the employer has actively concealed or misled the employee regarding the existence of the adverse action or the discriminatory grounds. The employee is unable to file due to extreme illness or injury or because of a natural disaster such as snow storm, flood or hurricane, or if the employee mistakenly filed a timely complaint with another agency that did not have jurisdiction.

Conditions that will not justify an extension of the filing period are ignorance of the statutory filing period, filing of unemployment compensation claims, workers' compensation claims, lawsuit, grievances or arbitration actions.

After receiving a complaint and determining that it is timely and establishes a *prima facie* case, the investigator will check the DOL computer system for prior discrimination or safety and health cases related to the employer. In addition, he will obtain copies of relevant materials related to prior discrimination cases or safety and health investigations. When a field investigation is conducted, the investigator looks for the following matters:

1. That the complainant engaged in an activity protected under OSHA.

2. That the employer must be shown to have been aware or suspected the complainant engaged in protected activity.

3. The evidence must demonstrate that the complainant suffered some form of adverse action, including, but not limited to, discharge, demotion, reprimand, harassment, layoff, failure to hire or failure to promote.

4. A causal link between a protected activity and the adverse action must be established. In this regard, the employer will look for animus toward a protected activity or safety and health proximity in time between the protected activity and the adverse action, disparate treatment of the complainant compared to other similarly situated employees, false testimony or manufactured evidence and pretextual defenses by the respondent.

After the *prima facie* case is established, respondent must produce some evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason such as poor work, absenteeism, misbehavior or economic layoff. If the respondent produces this evidence, OSHA or the complainant must show by a preponderance of evidence that the real reason for the adverse action was a protected activity. This may be inferred by showing the legitimate, nondiscriminatory reason was pretextual, such as the non-safety related misconduct did not occur, that other employees engaged in similar misconduct or that the misconduct played no role in the adverse action. The test is but for the protected activity, the adverse action would not have occurred or the misconduct was minor in nature.

To successfully develop the essential elements of the case, the investigator will determine the complainant's allegations through a detailed interview, corroborate the allegations through witnesses and other evidence, and determine the respondent's answers to the allegations and defenses. He will then corroborate the respondent's response, probably by interviewing witnesses, determine the complainant's answer to the respondent's defense and corroborate the complainant's answer to resolve all discrepancies.

If after an initial contact with the complainant it appears that the complainant has presented a *prima facie* allegation, the investigator will conduct a field investigation. This will involve personal interviews and onsite collection of documentary evidence. Investigators will personally interview all appropriate witnesses and in limited circumstances, will take evidence by telephone, mail or electronically. The investigator will conduct a detailed interview of the complainant and obtain a verified statement detailing his or her allegations. If at any time during the proceedings it can be conclusively established that a *prima facie* case cannot be developed, the investigation will be terminated and closed.

The complainant will be encouraged to identify as many witnesses as possible, including names, home addresses and phone numbers, and to provide copies of any discharge notices, reprimands, warnings or personnel actions, performance appraisals, earnings and benefit receipts, copies of grievances, unemployment benefit claims and determinations, job position descriptions, company policy books, copies of charges or claims filed with other agencies or attorneys,

medical records and collective bargaining agreements. The complainant will also be asked what he or she is seeking in the form of either back pay or reinstatement. The complainant is advised that he or she has an obligation to look for work and to keep records of interim earnings until the case is resolved. Otherwise, potential back pay may be decreased.

The whistleblower inspections manual for DOL specifically provides in §3, page 6:

In many cases, after the initial contact, 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.

It is extremely important that the initial contact with the investigator thoroughly document all of the employer's defenses and allegations regarding the charge of retaliation. Changing the company's position in midstream of an investigation is dangerous because it destroys the company's credibility. This is precisely why one should not undertake responding to an initial complaint of retaliation without corporate input.

When interviews are taking place, the employer's attorney has the right to be present during interviews of management and supervisory officials. The attorney does not have the right to be present during interviews of non-management or non-supervisory employees.

It is important to note that OSHA has subpoena power should a company refuse to cooperate. It is also important to note that courts will not quash a subpoena because courts consider this merely to be a fact-finding procedure and do not want to interfere with the government's performing its function.

If in the early stages of the investigation the investigator believes that there may be a *prima facie* case, the investigator may consult with the Regional Solicitor's Office, the attorneys for the DOL. This means that the investigator has a strong belief that the company has retaliated against the employee and believes that litigation may be necessary. Many times the attorney for OSHA may, upon review of the file advise the investigator that the file is not litigation worthy, which may obviate the need for further investigative efforts.

The investigator must attempt to obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion and bias testimony. If a witness will not sign a statement, the investigator will rely upon his notes taken during the interview, which notes may not be accurate.

Throughout the investigation, the investigator will discuss the case with the complainant. However, he will not reveal the identity of the witnesses interviewed. At the end of the investigation, there will be a closing conference with the complainant, during which the investigator will inform the complainant of his rights to appeal and the basis for the investigator's determination.

After the investigation is completed, the investigator will discuss the case with his supervisor and the supervisor will review the file and will review the investigator's recommendations. If legal action is being considered, the supervisor will review the recommendation for consistency with legal precedent and policy impact.

If the recommendation is to dismiss, the supervisor will prepare a letter of dismissal to the complainant with a copy to the respondent. If there has been a settlement offer, the supervisor will review and approve the settlement offer and sign off on it. If the determination is that the case is litigation worthy and the employer refuses to make the employee whole, the case will go to the attorneys for review and possibly the filing of suit in the appropriate united states district court.

If the suit is not considered litigation worthy, the file will be closed and the complainant may appeal to Washington, D.C. However, the complainant does not have the right to file his own civil action. Litigation under §11(c) is expressly reserved to the Department of Labor.