

When the Whistle Blows

What happens when employees are really unhappy...

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EXPAND YOUR EXPECTATIONS™

Unhappy employee can =

- Complainant (EEOC, OSHA, MSHA, NLRB)
- Whistleblower (False Claims Act)
- As complainant,
 - Call OSHA or other government agencies
 - Or talk with company
 - OSHA Involved
 - Phone & fax
 - Inspection
 - Disagreement with policies, i.e. False Claims Act, employment policies, safety policies

Laws With Retaliation Provisions:

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act (ADEA)
- The Americans with Disabilities Act (ADA)
- The Family Medical Leave Act (FMLA)
- The Fair Labor Standards Act (FLSA)
- The National Labor Relations Act (NLRA)
- The Occupational Safety and Health Act (OSHA)
- Civil Rights Laws
 - 42 U.S.C. § 1981
 - 42 U.S.C. § 1983
 - 42 U.S.C. § 1985(3)

More Laws with Retaliation Provisions:

- The False Claims Act
- The First Amendment to the U.S. Constitution
- The Employee Retirement Income Security Act (ERISA)
- The Immigration Reform and Control Act (IRCA)
- The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Executive Order 11246 (OFFCP)
- Title VI (prohibition in government funding based upon race)
- The Job Training Partnership Act
- The Employee Polygraph Protection Act

OSHA jurisdiction for whistleblower complaints

- 15 U.S.C. §2651 Asbestos Hazard Emergency Response Act (AHERA)
- 42 U.S.C. §7622 Clean Air Act (CAA)
- 42 U.S.C. §9610 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- 12 U.S.C.A. §5567 Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
- 15 U.S.C. §2087 Consumer Product Safety Improvement Act (CPSIA)
- 42 U.S.C. §5851 Energy Reorganization Act (ERA)
- 49 U.S.C. §20109 Federal Railroad Safety Act (FRSA)
- 33 U.S.C. §1367 Federal Water Pollution Control Act (FWPCA)
- 46 U.S.C. §80507 International Safe Container Act (ISCA)
- 49 U.S.C. §30171 Moving Ahead for Progress in the 21st Century Act (MAP-21)

OSHA jurisdiction for whistleblower complaints

- 6 U.S.C. §1142 National Transit Systems Security Act (NTSSA)
- 29 U.S.C. §660, Section 11(c) Occupational Safety and Health Act
- 49 U.S.C. §60129 Pipeline Safety Improvement Act (PSIA)
- 42 U.S.C. §300j-9(i) Safe Drinking Water Act (SDWA)
- 18 U.S.C.A. §1514A Sarbanes-Oxley Act (SOX)
- 46 U.S.C. §2114 Seaman's Protection Act, 46 U.S.C. §2114 (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281
- 21 U.S.C. 399d Section 402 of the FDA Food Safety Modernization Act (FSMA)
- 29 U.S.C. 218C Section 1558 of the Affordable Care Act (ACA)
- 42 U.S.C. §6971 Solid Waste Disposal Act (SWDA)
- 49 U.S.C. §31105 Surface Transportation Assistance Act (STAA)
- 15 U.S.C. §2622 Toxic Substances Control Act (TSCA)
- 49 U.S.C. §42121 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)

Elements of a Whistleblower/Retaliation Claim

- The employee must show:
 1. Protected activity
 2. Adverse employment action
 3. Causal connection

1. Protected Activity

- Two forms:
 - Opposition
 - Participation

1. Protected Activity (continued)

a. Opposition

- Filing or threatening to file a charge of discrimination or other complaint
- Making an internal complaint alleging discrimination
- Opposing a discriminatory practice or policy

OSHA's not here, but employee complains about safety

- Protected Activity
 - Good faith by employee to refuse to work in unsafe condition
 - Legitimate concerns about another employee's safety
- Not Protected Activity
 - Employee refuses to perform work, but no good faith safety concern
 - Employee can be disciplined

1. Protected Activity (continued)

b. Participation

- Complaints to the FCA claim, EEOC, OSHA, or MSHA
- OSHA investigates 22 different statutes for whistleblower activity
 - More whistleblower activity than any other agency
 - OSHA's biggest initiative
 - Filing of on-line complaints

2. Adverse Employment Action

- Termination, demotion, failure to promote and the like are clearly considered adverse actions
- Other actions are not so clear
- However . . .

2. Adverse Employment Action (continued)

- *Burlington Northern and Santa Fe Rwy Co. v. White*
- The Supreme Court held that retaliatory conduct need not be employment related
- Plaintiff must show that a reasonable employee would have found the challenged action materially adverse

2. Adverse Employment Action (continued)

- The action would have dissuaded a reasonable worker from making or supporting a charge of discrimination
- Although *Burlington* involved a Title VII claim, the principle has been applied under other federal laws and also under state laws

2. Adverse Employment Action (continued)

- **Is this adverse action?**
 - Supervisor's refusal to invite an employee to lunch
 - Petty slights, minor annoyances, and simply lack of good manners
 - A written reprimand that was later rescinded

2. Adverse Employment Action (continued)

- **Is this adverse action?**
 - Exclusion of an employee from a weekly training lunch
 - Yelling at the employee
 - Heightened scrutiny
 - A lower performance evaluation

3. Causation

- Direct Evidence
- Circumstantial Evidence:
 - Decision maker knew of the protected activity
 - Close proximity between the report and the adverse action suggests a causal link

3. Causation (continued)

- Inconsistencies between explanations given for the adverse action
- Sharp contrast in treatment of employee before and after notice of protected conduct

Non-Retaliatory Reason for Employment Actions

- Legitimate business reasons
- Consistency
- Pretext

A Variety of whistleblowers

- Safety complainant
 - Traditionally thought of as what OSHA investigates
 - Employee concerned about safety of job
- Various Statutes investigated by OSHA (a few examples)
 - Sarbanes-Oxley, Affordable Care Act, Food Safety Act
 - Employee concerned about practice of employer, concerned about retaliation for complaint
- False Claims Act and Dodd Frank
 - Ranges from financial industry to Medicare/Medicaid fraud
 - Monetary incentive to employees

Unhappy employee and OSHA arrives – the making of a whistleblower...

- OSHA conducts on site inspection
- Private interviews with non-management
- Safety perception very important
 - “management doesn’t listen to our safety concerns”
 - “production is more important”
 - Red Flags to OSHA inspector
 - My employer has monetary incentives tied to low injury and illness rates...
- Next could be referral to OSHA 11(c) investigator
- Uniqueness to 11(c)
 - Government has sole right of prosecution

Tips to Avoid Safety Complainant – Good Safety Culture

- If employee raises safety concern
 - Review concern
 - If legitimate, address the issue
 - If not, explain to the employee why there is no cause for concern
 - Employees need to know there are other outlets to address safety concerns
 - HR
 - Other managers

Sarbanes-Oxley, ACA, Food Safety

- Sarbanes-Oxley – not just public companies
 - *U.S. Supreme Court - Lawson v. FMR LLC – contractor to public company*
- Scenario
 - Employee notices improper practices or, even more likely what the employee reasonably believes equates to improper practices
 - Employer terminates employee for making false claims
 - Whistleblower?
 - Reasonable belief?
- OSHA tasked with investigation, but private right of action for employee
- Cases are reviewed by OSHA, but further review comes from administrative law judges.

Tips for Employers

- Prepare statement of position to agency investigating whistleblower claims (perhaps with accompanying affidavits)
- Prepare management employees for interviews by investigating agency/ participation in interviews
- Prepare non-management employees for interviews – if outside counsel involved, explain role of company’s counsel vs. attorney representing employee / may or may not be able to participate in interviews
- Participate in interview of whistleblower, if still employed
 - Caution – make sure no further retaliation
- Provide additional information to investigating agency
- Be aware that a unionize facility could have union counsel assisting
- Be aware that for all except 11(c) complaints, employee may have private counsel assisting

Another type of whistleblower....

- Bounty whistleblowers
 - False Claims Act/*Qui Tam* – employee can get recovery for bringing allegations to government
 - Employee files complaint in court (usually sealed action)
 - DOJ has 60 days to investigate
 - Employee can continue to pursue claim or
 - DOJ can take up action
 - Whistleblower protections
- Dodd Frank
 - Investigations by SEC of improper financial activities
 - Monetary incentives to employees
 - Private right of action
 - Protections for participation in actions

Bounty Whistleblowers

- Scenario
 - Employee aware of improper activity
 - Gathers documentation
 - Trade Secret – confidential business information?
 - Maybe, but many cases have held that if it demonstrates truth of claim, can be used
 - Sometimes results in actions by employer against employee
- Big money cases
 - 15 to 25% of recovery in many cases for FCA
 - 10 to 30 % under Dodd Frank
 - Recent case alleged \$350 million in Medicare Advantage payment fraud
 - \$87,500,000 payday?

Tips to Avoid Whistleblower Activity

- Internal Reporting
- Prompt and thorough investigations
- Clear policy prohibiting retaliation
 - Make sure your policy states retaliation specifically
- Policy allowing reports to external agencies
 - Anything that would discourage such reporting can be a problem
- Training for all managers to understand the potential for whistleblower activity
- Monitor terminations
 - Angry employees often become “after the fact” whistleblowers
 - Still must prove all elements of their claims, but can create a headache for the employer
 - Be aware of making someone a whistleblower during a termination

Questions?

- **THANK YOU FOR ATTENDING!**