

## **Whistleblower Protection under the Occupational Safety and Health Act (OSHA)**

### Introduction:

The OSHA provides some anti-discrimination protection for employees. Title 29, Section 660c(1) of the United States Code contains a provision that prohibits any person from discharging, or in any manner discriminating against, an employee because that party has exercised any right allowed under the OSHA to file a complaint (i.e. to report unsafe working conditions) or participate or testify in a related proceeding.

### Violations of 29 USCS 660c(1):

There are two main bases for violations. The Supreme Court, in Whirlpool Corp. v. Marshall, 100 S.Ct. 883 (1980) held that while there is no general right afforded by the OSHA to allow employees to walk off the job because of potential unsafe conditions, an employee may have that right to do so if the employee justifiably believes that the express arrangement for complaining about unsafe working conditions does not sufficiently protect them from death or serious injury. An employer's discharge or reprimand of an employee under the above circumstances is considered discriminatory and in violation of 29 USC 660c(1). Also, an employer who reprimands or discharges an employee who makes a report of a potential OSHA violation (or anything pertaining to unsafe working condition) may be violating the anti-discrimination provision of the OSHA. Employers who are found to discriminate under this statutory provision may be liable for reinstatement, back pay and other forms of relief.

### Procedures for Filing a Complaint:

The regulations contained in 29 CFR 1977 provide the specifics on how to file a complaint with the Secretary of Labor at the nearest Occupational Safety and Health Administration office. Generally, the employee or their representative may file a complaint within 30 days after a potential discriminatory action occurs. The 30 day filing requirement can be tolled in some cases where there is evidence of deception on the employer's part or where the employee is using a grievance procedure (such as an administrative grievance procedure or collective bargaining procedure) to dispute the basis for the adverse action.

Once a claim has been filed, an administrative investigation may be initiated. Then, a hearing might be requested by the Department of Labor (DOL) or by the employer. At the hearing, the employer has the opportunity to submit exculpatory evidence that the adverse action was taken for a legitimate reason and not in retaliation for a protected disclosure of a potential OSHA violation. During the hearing, the employee making the complaint retains the burden of persuasion, by the preponderance of the evidence, to show that the protected disclosure played a role in the employment

decision. The employer must show that they would have reached the same employment decision in the absence of any protected disclosure.

#### Behavior Constituting a Violation:

Examples where the courts found violations of the anti-discrimination provisions of 29 USCS 660c(1) are provided below:

a. Employees who were fired for refusing to step out on a wire mesh screen guard suspended above the plant floor because the screen guard had given away in previous instances and several employees had been injured or killed. Whirlpool.

b. An employee who was fired for refusing to load lead scrap into a melting kettle using a pay-loader without a windshield or enclosed cab because of the potential for an explosion caused by alleged defects in the kettle. Marshall v. N.L. Industries, 618 F.2d 1220 (7<sup>th</sup> Cir., 1980).

c. A pet store employee who was fired for reporting a potential health hazard to the OSHA ("parrot fever"). Marshall v. Commonwealth Aquarium, 611 F.2d 1 (1<sup>st</sup> Cir., 1979).

d. Four employees who were fired after repeatedly filing grievances over safety related issues that were not corrected at their worksite. Donovan v. Freeway Construction Co., 551 F.Supp. 869 (D.R.I., 1982).

e. Three machinists who were fired following their complaint to the OSHA regarding the improper ventilation of fumes during welding. Donovan v. Peter Zimmer America, Inc., 557 F.Supp. 642 (D.S.C., 1982).

In the above cases, the employees were treated sufficiently differently than their colleagues for the courts to find a nexus between their termination and the protected activity (i.e. filing a complaint or refusing to work in imminently dangerous conditions).

#### Additional Authority of the DOL:

Along with what are traditionally thought of as "safety issues" under the OSHA, the DOL also has the authority under 29 CFR 24 to investigate complaints of employer retaliation for "whistle blowing" under the following statutes: the Safe Drinking Water Act, the Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Energy Reorganization Act, and the Comprehensive Environmental Response, Compensation and Liability Act. Reprisal complaints pertaining to potential violations of the above statutes can be filed within 30 days at the nearest Occupational Safety and Health Administration office. Possible reprisal for reporting violations of the above statutes is investigated in the same manner by the DOL as possible reprisal for reporting potential violations of the OSHA.