

## CUSSING OUT YOUR EMPLOYEE MAY GET YOU SUED...BY OSHA?

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Hopefully you're already aware of the continuing escalation of all forms of whistleblower and retaliation claims, including under the 20+ Anti-Retaliation laws enforced by special investigators from OSHA's Whistleblower group. If not, check out the [Whistleblower Protection Program website](#).

One of OSHA's recent news releases states that the Labor Department has filed a lawsuit in the federal district court against Duane Thomas Marine Construction, and its owner Duane Thomas, for terminating an employee who reported workplace violence, in violation of Section 11(c) of the OSH Act. Sounds fairly standard. OSHA asserts that an employer fired an employee for complaining about unsafe work conditions. It's a bit unusual to hear that the alleged unsafe conditions involved fear of workplace violence, but who can blame an employee in the current environment?

But as you read on, it turns out that the complained-of hazard was the owner!

### WHEN THE OWNER IS THE HAZARD

The employee alleged that, on numerous occasions between 2009 and 2011, Mr. Thomas committed workplace violence and created hostile working conditions. He allegedly behaved abusively, made inappropriate sexual comments and advances, yelled, screamed, and made physically-threatening gestures, in addition to withholding the employee's paycheck.

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The employee, who worked directly for Thomas, reported to him that he was creating hostile conditions. On Feb. 25, 2011, the employee filed a timely whistleblower complaint with OSHA alleging discrimination by Thomas for having reported the conditions to him.

On March 18, 2011, Thomas received notification of the complaint filing. Five days later, Thomas had computer passwords changed in order to deny the employee remote access to files and then terminated the employee. OSHA's subsequent investigation found merit to the employee's complaint.

And we're not just talking reinstatement: OSHA seeks back wages, interest, and compensatory and punitive damages, as well as front pay in lieu of reinstatement. Additionally, it seeks to have the employee's personnel records expunged with respect to the matters at issue in this case and to bar the employer against future violations of the OSH Act. Wow.... But first, the usual caveat: we don't know all the facts.

The employer may have really behaved badly and given the complainant the ability to make out a viable claim. Or, the employee may have exaggerated, or even made up the whole thing. But while I have yet to see an employee lawsuit that was completely accurate, there must be at least some pretty bad facts to make OSHA take the action it did.

## **LESSONS AND ACTION POINTS?**

This atmosphere may or may not have presented a valid safety hazard, but guess what? Under the law, the violation is the act of terminating the employee for complaining about a safety concern. *The concern does not have to be valid!* (There is a different standard if the employee **refuses** to work because of an unfounded and unreasonable concern).

For all we know, the employee could have annoyed his boss with unfounded complaints until the boss fired him in a moment of anger... but that too is a potential violation.

Our advice: eliminate from your vocabulary the two phrases: "Boys will be boys," and

"You had to be there." The problem is that lawyers and Uncle Sam will also be there if one's conduct is foolish enough.

Train your supervisors to behave professionally regardless of the setting, and remind them of all the many behaviors, including some of the offbeat ones, that are protected as Whistleblowing.

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